

HUMAN
RIGHTS
WATCH



GENOCIDE WAR CRIMES CRIMES AGAINST HUMANITY

A Topical Digest of the Case Law
of the International Criminal Tribunal
for the Former Yugoslavia

Genocide, War Crimes and Crimes Against Humanity

**A Topical Digest of the Case Law of the International
Criminal Tribunal for the Former Yugoslavia**

Copyright © 2006 Human Rights Watch

All rights reserved.

Printed in the United States of America

ISBN: 1-56432-339-0

Cover design by Rafael Jimenez

Human Rights Watch

350 Fifth Avenue, 34th floor

New York, NY 10118-3299 USA

Tel: 1-(212) 290-4700, Fax: 1-(212) 736-1300

hrwnyc@hrw.org

1630 Connecticut Avenue, N.W., Suite 500

Washington, DC 20009 USA

Tel: 1-(202) 612-4321, Fax: 1-(202) 612-4333

hrwdc@hrw.org

2nd Floor, 2-12 Pentonville Road

London N1 9HF, UK

Tel: 44 20 7713 1995, Fax: 44 20 7713 1800

hrwuk@hrw.org

Rue Van Campenhout 15,

1000 Brussels, Belgium

Tel: 32 (2) 732-2009, Fax: 32 (2) 732-0471

hrwatcheu@skynet.be

9 rue Comavin

1201 Geneva, Switzerland

Tel: +41 22 738 04 81, Fax: +41 22 738 17 91

hrwgva@hrw.org

Poststraße 4-5

10178 Berlin, Germany

Tel. +49 30 259 306 10, Fax. +49 30 259 306 29

berlin@hrw.org

Web Site Address: <http://www.hrw.org>

HUMAN RIGHTS WATCH

Human Rights Watch is dedicated to protecting the human rights of people around the world.

We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice.

We investigate and expose human rights violations and hold abusers accountable.

We challenge governments and those who hold power to end abusive practices and respect international human rights law.

We enlist the public and the international community to support the cause of human rights for all.

Human Rights Watch conducts regular, systematic investigations of human rights abuses in some seventy countries around the world. Our reputation for timely, reliable disclosures has made us an essential source of information for those concerned with human rights. We address the human rights practices of governments of all political stripes, of all geopolitical alignments, and of all ethnic and religious persuasions. Human Rights Watch defends freedom of thought and expression, due process and equal protection of the law, and a vigorous civil society; we document and denounce murders, disappearances, torture, arbitrary imprisonment, discrimination, and other abuses of internationally recognized human rights. Our goal is to hold governments accountable if they transgress the rights of their people.

Human Rights Watch began in 1978 with the founding of its Europe and Central Asia division (then known as Helsinki Watch). Today, it also includes divisions covering Africa, the Americas, Asia, Europe and Central Asia and the Middle East and North Africa. In addition, it includes three thematic divisions on arms, children's rights, and women's rights. It maintains offices in Berlin, Brussels, Geneva, London, Los Angeles, Moscow, New York, San Francisco, Tashkent, Toronto, and Washington. Human Rights Watch is an independent, nongovernmental organization, supported by contributions from private individuals and foundations worldwide. It accepts no government funds, directly or indirectly.

The staff includes Kenneth Roth, Executive Director; Michele Alexander, Development and Outreach Director; Carroll Bogert, Associate Director; Peggy Hicks, Global Advocacy Director; Iain Levine, Program Director; Dinah PoKempner, General Counsel; Aisling Reidy, Senior Legal Advisor; James Ross, Senior Legal Advisor; Joe Saunders, Deputy Program Director; and Wilder Tayler, Legal and Policy Director.

The division directors of Human Rights Watch are Brad Adams, Asia; Joseph Amon, HIV/AIDS and Human Rights; Peter Bouckaert, Emergencies; Bruni Burres, International Film Festival; Holly Carner, Europe and Central Asia; Richard Dicker, International Justice; Jamie Fellner, United States; Bill Frelick, Refugees; Arvind Ganesan, Business and Human Rights; Steve Goose, Arms; LaShawn R. Jefferson, Women's Rights; Scott Long, Lesbian, Gay Bisexual and Transgender Rights; Joanne Mariner, Terrorism and Counterterrorism; Peter Takirambudde, Africa; José Miguel Vivanco, Americas; Lois Whitman, Children's Rights; and Sarah Leah Whitson, Middle East and North Africa.

The advocacy directors of Human Rights Watch are Steve Crawshaw, London; Loubna Freih, Geneva; Marianne Heuwagen, Berlin; Lotte Leicht, Brussels; and Tom Malinowski, Washington, DC.

The members of the board of directors are Jane Olson, Chair; James F. Hoge, Jr., Vice-Chair; Sid Sheinberg, Vice-Chair; John J. Studzinski, Vice-Chair; Omar Amanat, Lloyd Axworthy, David Brown, Jorge Castañeda, Dorothy Cullman, Edith Everett, Jonathan Fanton (Chair 1998-2003), Michael Gellert, Richard Goldstone, Vartan Gregorian, Wendy Keys, Robert Kissane, Bruce Klatsky, Joanne Leedom-Ackerman, Josh Mailman, Susan Manilow, Kati Marton, Linda Mason, Barry Meyer, Joel Motley, Samuel K. Murumba, Catherine Powell, Sigrid Rausing, Victoria Riskin, Kevin Ryan, Donna Stanton, John Taylor, and Shibley Telhami.

Emeritus Board members are Roland Algrant, Lisa Anderson, Robert L. Bernstein (Founding Chair 1978-1997), William D. Carmichael, Adrian W. DeWind, Alice H. Henkin, Stephen L. Kass, Marina Pinto Kaufman, Peter Osnos, Kathleen Peratis, Bruce Rabb (Secretary), Orville Schell, Gary Sick, and Malcolm B. Smith.

ACKNOWLEDGEMENTS

The author of this updated volume is Jennifer Trahan, Of Counsel to the International Justice Program of Human Rights Watch. Ms. Trahan is a consultant on international justice issues and teaches courses on international criminal tribunals and/or international law as an Adjunct Assistant Professor at Fordham Law School, Brooklyn Law School, and the New School for General Studies.

The following interns assisted in the compilation, formatting, researching and/or proofreading of this book: Joni M. Canada, Brian Honermann, Jennifer Kettner and Amber Lewis (from Fordham Law School); Laureve Blackstone, Deepinder Mayell and Kelly Paul Peters (from Brooklyn Law School); Jill Dawson, Neza Kogovsek, and Leonie von Braun (Human Rights Watch interns or former interns); and Jay Meisel.

Richard Dicker, Director of the International Justice Program, provided overall guidance. Bogdan Ivanisevic, researcher on Bosnia and Herzegovina, Croatia, and Serbia and Montenegro provided review on behalf of the Europe and Central Asia Division. Wilder Tayler, Human Rights Watch's legal and policy director, provided the legal and policy review. Joe Saunders, Deputy Program Director, conducted program review. Hannah Gaertner, associate in the International Justice Program, Veronica Matushaj, photo editor and associate director in the Development and Outreach division, Andrea Holley, manager of outreach and public education, and Fitroy Hepkins, mail manager in the Publications division, assisted in preparing this report for production.

Human Rights Watch additionally gratefully acknowledges the assistance of Shearman & Sterling's London Office and Schulte Roth & Zabel LLP (NY) in formatting the manuscript for publication. In particular, Human Rights Watch expresses appreciation to Schulte Roth & Zabel partner Brooks R. Burdette, and Shearman & Sterling associate (and former Human Rights Watch intern) Lisa Gambone.

Human Rights Watch also acknowledges the assistance of Marieke Wierda, Senior Associate at the International Center for Transitional Justice, for providing valuable advice regarding the final chapter of the book.

Human Rights Watch also would like to acknowledge the financial support of the John D. and Catherine T. MacArthur Foundation and the JEHT Foundation.

PREFACE

This book provides a topically organized digest of the jurisprudence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY or Tribunal). It is intended as an accessible reference tool to assist practitioners and researchers as they familiarize themselves with ICTY case law.

The digest includes judgments publicly available through December 31, 2005. A full list of the judgments included is located on pages 15-18.

The book is divided into ten chapters. It covers: war crimes (both grave breaches, and violations of the laws or customs of war), genocide, crimes against humanity, individual responsibility, command responsibility, affirmative defenses, jurisdiction, sentencing, as well as miscellaneous topics such as fair trial rights, guilty pleas and appellate review. Summarizing and excerpting from ICTY judgments, the chapters on war crimes, genocide and crimes against humanity, for example, detail the general requirements for each crime, as well as underlying offenses. The book does not cover motion practice; thus, for example, there is only limited material on evidentiary issues.

Many of the judgments quoted contain citations to other judgments or documents. Human Rights Watch has not reproduced those here. Please refer to the official judgments for these additional citations.

This updated edition of the book, unlike its predecessor volume published by Human Rights Watch in February 2004, contains "application" sections that quote ICTY judgments applying the facts to the law. Because such analysis within the actual ICTY judgments is generally quite lengthy and detailed, these application sections are necessarily truncated. For example, while the "campaign of sniping and shelling" of Sarajevo is discussed for approximately 186 pages in the *Galic* Trial Chamber judgment, it is represented by only a few paragraphs in this digest. For the full factual analysis, please refer to the official judgments. Additionally, the "application" sections do not purport to be comprehensive. Their inclusion or exclusion should not be read as commentary on the relative importance or unimportance of particular judgments or portions of judgments.

This book generally uses terms as they are defined in the individual judgments quoted. It is thus possible that the same term may be defined differently in different places within the book. For example, *Vojaska Republike Srpske* (VRS or Army of Republika Srpska) is defined in slightly different ways in different judgments. No attempt has been made to harmonize all such defined terms throughout the book.

This digest, of course, is not intended to be and should not be used as a substitute for reading the actual decisions of the ICTY, which can be found on the ICTY website at <http://www.un.org/icty/>. The Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/Res/827 (1993), as amended (ICTY Statute or Statute), can be found at <http://www.un.org/icty/legal/doc/index.htm>.

SUMMARY TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	i
PREFACE.....	ii
SUMMARY TABLE OF CONTENTS	iii
FULL TABLE OF CONTENTS.....	v
SUMMARY OF JUDGMENTS AGAINST THE ACCUSED.....	1
LISTING OF CASES INCLUDED	15
D) WAR CRIMES: GRAVE BREACHES OF THE GENEVA	
CONVENTIONS OF 1949 (Article 2).....	19
a) Statute.....	19
b) General elements for Article 2 crimes.....	19
c) <i>Mens rea</i>	37
d) Underlying offenses	38
e) Miscellaneous	53
II) WAR CRIMES: VIOLATIONS OF THE LAWS OR CUSTOMS	
OF WAR (Article 3).....	55
a) Statute.....	55
b) Generally.....	55
c) General elements for Article 3 crimes.....	62
d) Underlying offenses	77
III) GENOCIDE (Article 4).....	144
a) Statute.....	144
b) Generally.....	145
c) Specific intent/ <i>dolus specialis</i> : intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such	146
d) Application—genocide.....	168
e) Underlying offenses	179
f) Punishable acts/ modes of responsibility for committing genocide	186
IV) CRIMES AGAINST HUMANITY (Article 5).....	192
a) Statute.....	192
b) General elements	193
c) Application—general elements for Article 5.....	230
d) Underlying offenses	233
V) INDIVIDUAL RESPONSIBILITY (Article 7(1)).....	352
a) Statute.....	352
b) Generally.....	352

c) Planning, instigating, ordering, committing	353
d) Aiding and abetting	370
e) Joint criminal enterprise/ the common purpose doctrine	390
VI) COMMAND RESPONSIBILITY (Article 7(3))	446
a) Statute	446
b) Generally	446
c) Elements	450
d) Superior responsibility for genocide	500
e) Application—superior responsibility	502
VII) AFFIRMATIVE DEFENSES	506
a) “Alibi” defense	506
b) Duress does not afford a complete defense	506
c) <i>Tu quoque</i> principle rejected: the argument that the adversary committed similar crimes is not a valid defense	506
d) Involvement in defensive operation is not a defense	506
e) Diminished mental responsibility is not a defense	508
VIII) JURISDICTION	509
a) Generally	509
b) Alleged illegal arrest did not deprive the Tribunal of jurisdiction	509
IX) CHARGING, CONVICTIONS AND SENTENCING	513
a) Cumulative charging	513
b) Cumulative and concurrent convictions	513
c) Sentencing	527
X) MISCELLANEOUS	698
a) General considerations regarding legal interpretation	698
b) Fair trial rights	700
c) General considerations regarding the evaluation of evidence	740
d) Precedent and appellate review generally	751
e) Appellate Chamber review of sentencing judgments	778
f) Accepting guilty pleas	788

FULL TABLE OF CONTENTS

SUMMARY OF JUDGMENTS AGAINST THE ACCUSED	1
LISTING OF CASES INCLUDED	15
I) WAR CRIMES: GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949 (Article 2)	19
a) Statute	19
b) General elements for Article 2 crimes	19
i) the existence of an armed conflict (element 1)	20
(1) armed conflict required	20
(2) armed conflict defined	20
(3) duration of application of international humanitarian law	21
ii) there must be a nexus between the conflict and crimes alleged (element 2)	21
(1) not necessary that actual combat occurred in the area where the crimes occurred	21
(2) it is sufficient that the crimes were closely related to the hostilities	22
iii) the armed conflict must be international (element 3)	22
(1) international armed conflict required	22
(2) international armed conflict defined	22
(3) where state has not intervened in another state directly through its own troops, “overall control test” applies to determine whether sufficient control over military forces exists	23
(4) overall control test satisfied where a state has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support	24
(5) do not just look at the locality where the crimes occurred to determine if conflict is international	25
(6) failure to recognize state of war irrelevant	26
(7) pleading international armed conflict	27
(a) application—pleading international armed conflict	27
(8) application—international armed conflict	28
(a) conflict between Bosnia and Herzegovina, and Croatia	28
(b) conflict between Bosnia and Herzegovina, and the Federal Republic of Yugoslavia (Serbia and Montenegro)	29
iv) the person or property at issue must be “protected” (element 4)	30
(1) protected persons defined	31
(2) ethnicity, allegiance, and substance of relations more determinative of protected status than nationality or legal characterization	31

	(3)	protected persons can be same nationality as captor	33
	(4)	“in the hands of a party to the conflict or occupying power” defined.....	34
	(5)	application—protected persons.....	34
v)		application—general requirements of Article 2.....	35
	(1)	armed conflict and nexus between the alleged offenses and armed conflict.....	35
	(2)	armed conflict was international.....	36
	(3)	victims were protected persons	36
c)		<i>Mens rea</i>	37
	i)	generally.....	37
	ii)	knowledge of existence of international armed conflict.....	37
	iii)	distinguish intent from motive	37
d)		Underlying offenses.....	38
	i)	willful killing (Article 2(a)).....	38
	(1)	defined.....	38
	(2)	whether same as murder under Articles 3 and 5.....	39
	(3)	no dead body required.....	39
	(4)	<i>mens rea</i>	40
	(a)	no premeditation required.....	41
	(b)	<i>mens rea</i> may be inferred either directly or circumstantially.....	41
	ii)	torture or inhuman treatment (Article 2(b))	42
	(1)	torture.....	42
	(a)	elements.....	42
	(b)	same regardless of article	42
	(c)	severity of pain or suffering.....	42
	(i)	permanent injury not required	42
	(ii)	rape meets severity requirement	43
	(d)	prohibited purpose required.....	43
	(e)	public official not required	43
	(2)	inhuman treatment.....	44
	(a)	generally	44
	(b)	defined.....	44
	(c)	application—inhuman treatment.....	45
	(i)	use of persons as “human shields”.....	45
	(ii)	forced labor.....	45
	iii)	willfully causing great suffering or serious injury to body or health (Article 2(c)).....	46
	(1)	defined.....	46
	(2)	requires showing of serious mental or physical injury, although need not be permanent or irremediable.....	47
	iv)	extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly (Article 2(d)).....	47
	(1)	generally.....	47
	(2)	elements.....	47
	(3)	two types of property protected.....	48
	(4)	extensive destruction required.....	49

	(5) prohibition of destruction of property situated in occupied territory inapplicable where there is absolute military necessity	49
	(6) <i>mens rea</i>	50
v)	compelling a prisoner of war or a civilian to serve in the forces of a hostile power (Article 2(e))	50
vi)	willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial (Article 2(f))	50
vii)	unlawful deportation or transfer or unlawful confinement of a civilian (Article 2(g))	50
	(1) unlawful confinement	50
	(a) generally	50
	(b) unlawful confinement has same elements as imprisonment under Article 5	51
	(c) responsibility more properly allocated to those responsible for detention, not those who merely participate in it, such as those who maintain a prison	51
	(d) responsibility of camp commander	51
	(2) unlawful transfer	52
viii)	taking civilians as hostages (Article 2(h))	52
	(1) generally	52
	(2) application—taking civilians as hostages	53
e)	Miscellaneous	53
	i) occupation (relevant to unlawful labor of civilians, unlawful transfer and extensive destruction of property)	53
	(1) where “occupation” is relevant	53
	(2) definition	53
	(3) guidelines for determining occupation	54
	(4) only applies to areas actually controlled by the occupying power	54
	(5) different test would apply regarding individuals or property and other matters	55

II) WAR CRIMES: VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR (Article 3)

a)	Statute	55
b)	Generally	55
	i) Article 3 of the Statute functions as a residual clause, covering any serious violation of humanitarian law not covered by other Articles of the Statute	55
	ii) conditions for determining which violations fall within Article 3 (the “four <i>Tadic</i> conditions”)	56
	iii) violations of international humanitarian law that are covered	57
	(1) violations of Common Article 3 included	57
	(2) violations based on treaties included	58
	iv) rationale for why Common Article 3 violations are included	59
	(1) violations of Common Article 3 infringe a rule of international humanitarian law	59
	(2) Common Article 3 is part of customary law	59
	(3) violations of Common Article 3 are serious	60

	(4) Common Article 3 imposes individual criminal responsibility	60
v)	application of the four “ <i>Tadić</i> ” conditions to specific crimes meeting the requirements of Article 3	62
c)	General elements for Article 3 crimes	62
i)	there must have been armed conflict, whether internal or international (element 1)	63
	(1) armed conflict defined: assess the intensity of the conflict and the organization of the parties	64
	(a) assessment must be done on a case-by-case basis	64
	(b) assessing intensity of the conflict	65
	(c) assessing organization of the parties	65
	(d) banditry, unorganized and short-lived insurrections, or terrorist activities excluded	66
	(e) additional objectives irrelevant	66
	(i) application—additional objectives irrelevant	66
	(2) application—armed conflict	66
	(a) armed conflict in Kosovo between Serbian forces and the Kosovo Liberation Army	66
	(b) armed conflict in Bosnia and Herzegovina between its armed forces and Republika Srpska	68
	(c) armed conflict involving Croatian armed forces and the JNA (Yugoslav Peoples’ Army)	69
ii)	there must be a nexus between the armed conflict and alleged offense (element 2)	69
	(1) the acts of the accused must be closely related to the hostilities	69
	(2) factors for assessing nexus	70
	(3) the armed conflict need not be causally linked to the crimes, but it must have played a substantial role in the perpetrator’s ability to commit the crimes, his decision to commit them, the manner in which they were committed or the purpose for which they were committed	70
	(4) crimes may be temporally and geographically remote from actual fighting/international humanitarian law applies in the whole territory, whether or not actual combat takes place there	71
	(5) to establish nexus, crime need not have been planned or supported by a policy	72
	(6) single act may constitute violation if the required nexus is established	72
	(7) application—nexus	72
iii)	added element for Common Article 3 crimes: must be committed against persons taking no active part in the hostilities	74
	(1) assessing protected status	74
	(2) application—victims taking no active part in hostilities	75
iv)	<i>mens rea</i>	76
	(1) generally	76
	(2) discriminatory intent or motive not required	76
	(3) distinguish intent from motive	76
d)	Underlying offenses	77

i)	torture	77
(1)	defined	77
(2)	same regardless of Article	78
(3)	the prohibition against torture is <i>jus cogens</i>	78
(4)	severe pain and suffering must be inflicted (element 1)	78
(a)	assessing the severity of the torture	79
(b)	permanent injury not required	79
(c)	mental suffering can qualify	80
(d)	act or omission as torture	80
(e)	mistreatment less severe than torture may constitute another offense	80
(5)	<i>mens rea</i> : the act or omission must be intentional (element 2)	80
(6)	prohibited purpose or goal required (element 3)	81
(a)	prohibited purpose need not be predominating or sole purpose	82
(7)	perpetrator need not have acted in an official capacity	82
(8)	examples of acts constituting torture	83
(a)	rape and other forms of sexual violence as torture	83
(9)	application—torture	84
ii)	rape	85
(1)	defined	85
(2)	prohibition on rape in armed conflicts long recognized under treaty and customary international law	85
(3)	status of detention normally vitiates consent	85
(4)	resistance by victim and force by perpetrator not required	86
(5)	<i>mens rea</i>	86
iii)	cruel treatment	86
(1)	defined	86
(2)	elements same as inhuman treatment	87
(3)	mental suffering requirement lower than for torture	87
(4)	prohibited purpose not required	87
(5)	<i>mens rea</i>	87
(6)	practices that constitute cruel treatment	88
(a)	use of human shields	88
(i)	use of human shields prohibited even where they are not attacked	88
(b)	use of forced labor	88
(c)	prison camp detention conditions	89
(d)	shelling of civilian town	90
(e)	unlawful seizure, unlawful detention for prolonged periods and interrogation—not cruel treatment	90
iv)	murder	90
(1)	elements	90
(2)	comparison between murder under Articles 3 and 5 and willful killing under Article 2	92
(3)	proof of dead body not required	93
(4)	suicide as murder	94
(5)	willful omission to provide medical care as murder	94
(a)	application—willful omission to provide medical care as murder: the Omarska camp	94

(6)	death from cumulative effect of several beatings	95
(a)	application—death from cumulative effect of several beatings: the Keraterm camp in Prijedor	95
(7)	<i>mens rea</i>	95
(a)	awareness that the victims were persons taking no active part in the hostilities	96
(b)	inferring <i>mens rea</i>	97
(c)	<i>mens rea</i> regarding murder by artillery attack/shelling	97
(8)	application—murder	98
(a)	executions in the Berishe/Berisa Mountains of Kosovo	98
(b)	artillery attack on the Old Town of Dubrovnik, Croatia	98
(c)	Srebrenica massacre	99
(d)	Prijedor municipality—killings at the Keraterm, Omarska, and Trnopolje camps	99
(e)	Prijedor municipality—killings during transports and expulsions of the non-Serb civilian population	100
(f)	Prijedor municipality—killings committed as a result of armed military and/or police action in non-Serb areas	101
v)	violence to life and person	101
vi)	outrages upon personal dignity	102
(1)	defined	102
(2)	requires humiliation so intense any reasonable person would be outraged	102
(3)	humiliation must be real and serious	102
(4)	murder is not an outrage upon personal dignity	103
(5)	<i>mens rea</i>	103
(6)	prohibited purpose not required	103
(7)	discriminatory intent or motive not required	104
(8)	examples	104
vii)	taking of hostages	104
(1)	elements	104
(2)	same as Article 2	105
viii)	wanton destruction of cities, towns or villages, or devastation not justified by military necessity (Article 3(b))	105
(1)	generally	105
(2)	part of customary international law	105
(3)	elements	106
(4)	devastation and destruction equated	107
(5)	destruction or damage to property on a large scale (element 1)	107
(6)	not justified by military necessity (element 2)	107
(7)	<i>mens rea</i> (element 3)	108
(8)	application—wanton destruction of cities, towns or villages, or devastation not justified by military necessity	109
ix)	plunder (Article 3(e))	110
(1)	generally	110
(2)	defined	110
(3)	plunder includes both large-scale seizures and appropriation by individual soldiers for their private gain	111

	(4)	plunder must involve serious violation: requires grave consequences/sufficient monetary value measured individually or collectively	112
	(5)	where prohibition of plunder applies.....	113
	(6)	plunder includes “pillage” and “looting”	113
	(7)	when property may be requisitioned lawfully.....	114
	(8)	application—plunder.....	114
x)		seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science (Article 3(d))	115
	(1)	generally.....	115
	(a)	protection under international humanitarian law.....	115
	(i)	institutions dedicated to religion protected under international humanitarian law	116
	(b)	crime reflects customary international law.....	116
	(i)	destruction of educational buildings part of customary international law.....	116
	(2)	elements.....	117
	(3)	actual damage or destruction required.....	117
	(4)	military purposes exception.....	118
	(5)	whether there is a requirement that the institutions may not be in the immediate vicinity of military objectives	118
	(6)	<i>mens rea</i>	119
	(7)	overlap with offense of unlawful attacks on civilian objects.....	120
	(8)	application—seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.....	120
	(a)	destruction—attack by the JNA (Yugoslav Peoples’ Army) on the old Town of Dubrovnik	120
	(b)	not justified by military necessity.....	121
	(c)	<i>mens rea</i>	121
xi)		unlawful attack on civilians and civilian objects.....	122
	(1)	defined.....	122
	(2)	prohibition against attacking civilians stems from fundamental principle of distinction.....	123
	(3)	crime of attacking civilians or civilian objects is customary international law	123
	(4)	attack.....	123
	(5)	unlawful attack on civilians.....	124
	(a)	the civilian population shall not be the object of attack	124
	(b)	civilian population defined.....	124
	(c)	factors to consider in evaluating whether civilian	125
	(d)	cases of doubt.....	125
	(e)	presence of individual combatants within the population does not change its civilian character	125
	(f)	combatants and others directly engaged in hostilities are legitimate military targets.....	126
	(g)	combatant defined	126

	(h)	combatants obligated to distinguish themselves from civilian population.....	126
	(i)	members of territorial defense and armed forces at home remain combatants	127
	(j)	collateral civilian damage/principle of proportionality	127
(6)		unlawful attack on civilian objects.....	128
	(a)	civilian objects or property	128
	(b)	military objectives	128
	(c)	cases of doubt.....	128
(7)		indiscriminate attacks may qualify as direct attacks against civilians	129
(8)		no military necessity justification for attacking civilians or civilians objects.....	129
(9)		attack must have caused deaths and/or serious injury to body or health, or extensive damage to civilian objects.....	130
(10)		violations by one side of duty to remove civilians from vicinity of military objectives does not relieve other side of duty to respect principles of distinction and proportionality.....	131
(11)		<i>mens rea</i>	131
	(a)	awareness of civilian or civilian property status	132
	(b)	<i>mens rea</i> of a disproportionate attack	132
(12)		application—unlawful attack on civilians and civilian objects	133
	(a)	campaign of sniping at, and shelling of, civilians in Sarajevo.....	133
	(b)	Old Town of Dubrovnik, Croatia	135
xii)		unlawful confinement of civilians	135
	(1)	involuntary confinement not absolutely necessary is unlawful.....	136
	(2)	basic procedural rights must be respected	136
	(3)	where a person is definitely suspected of, or engaged in, activities hostile to the security of the state	137
xiii)		unlawful labor.....	137
	(1)	defined.....	137
	(2)	<i>mens rea</i>	138
xiv)		slavery	138
	(1)	defined.....	138
	(2)	same as “enslavement” under Article 5.....	138
	(3)	forced labor assignments may constitute slavery	139
	(4)	consider factual circumstances to determine whether labor was involuntary.....	139
	(5)	not all types of forced or compulsory labor are <i>per se</i> unlawful	140
	(6)	conditions for labor under international humanitarian law	140
xv)		terror against the civilian population	141
	(1)	defined.....	141
	(2)	“terror” is a crime within international humanitarian law	141
	(3)	actual infliction of terror not an element of the crime.....	142
	(4)	“acts of violence” do not include legitimate attacks against combatants	142
	(5)	<i>mens rea</i>	142
	(6)	dissent questions whether “terror” constitutes a crime within the Tribunal’s jurisdiction	142

(7)	application—terror against the civilian population	144
III)	GENOCIDE (Article 4).....	144
a)	Statute.....	144
b)	Generally	145
i)	defined.....	145
ii)	definition reflects customary international law and <i>jus cogens</i>	145
iii)	interpretive sources.....	146
c)	Specific intent/ <i>dolus specialis</i> : intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such	146
i)	generally.....	146
ii)	intent to destroy.....	147
(1)	goal must be destruction of group as a separate and distinct entity	147
(2)	even if destruction was not original goal, it may become the goal	147
(3)	requires an intentional attack against a group, and the intention to participate in or carry out the attack	147
(4)	knowledge that underlying crime would inevitably or likely result in destruction insufficient/destruction must be the aim.....	147
(5)	because specific intent to destroy is key, not necessary to prove actual destruction of group in whole or in part, although actual destruction may constitute evidence of specific intent.....	148
(6)	no lengthy premeditation required	148
(7)	must intend/seek physical or biological destruction	148
(a)	not required that the perpetrator choose the most efficient method of destruction	150
(b)	acts that do not cause death included in destruction.....	150
(c)	forcible transfer may be a basis from which to infer intent to destroy	151
(d)	whether forcible transfer may in certain circumstances be part of destruction.....	151
(8)	not limited to destruction of civilians/could include detained military personnel.....	153
(9)	distinguish specific intent from motive	153
(10)	no policy or plan required, but may be important factor	154
(11)	inferring intent.....	155
(a)	intent may be inferred.....	155
(b)	standard for inferring intent	155
(c)	factors for inferring specific intent.....	155
(d)	proof of mental state for underlying act may serve as evidence from which to infer specific intent	156
(e)	not necessary to prove statements showing genocidal intent.....	156
(f)	an inference of genocidal intent may be drawn even where individuals with intent are not precisely identified.....	157
(g)	application—inferring intent.....	157

iii)	“in whole or in part”	157
	(1) must be intent to destroy a distinct part of the group, not isolated individuals within it	157
	(2) “substantial” part of group required	158
	(3) factors for assessing whether group is substantial	159
	(4) evidence of destruction of leadership may establish intent to destroy “in part”	160
	(5) destruction may be limited to a geographical zone	161
	(6) application—substantial part of group	162
	(i) targeting the 40,000 Bosnian Muslims of Srebrenica was a substantial part of the targeted group	162
	(ii) the Bosnian Muslims and Bosnian Croats of the municipalities of the Autonomous Region of Krajina constituted a substantial part of the Bosnian Muslim and Bosnian Croat groups in Bosnia-Herzegovina	163
iv)	“a national, ethnical, racial or religious group, as such”	163
	(1) groups protected by Article 4	163
	(a) national, ethnical, racial or religious groups	163
	(b) not political groups	164
	(c) destroying culture and identity insufficient, but can help show intent to destroy	164
	(d) evaluate protected group on a case-by-case basis using objective and subjective criteria	165
	(e) group may be identified by stigmatization of the group	165
	(f) group may not be identify based on negative criteria	165
	(g) where more than one group targeted, consider each group separately	166
	(h) application—Bosnian Muslims were protected group	166
	(2) “as such”	167
	(a) victims must be targeted by reason of their group membership	167
	(b) the group must be targeted, not specific individuals	168
	(3) distinguishing genocide from persecution—where victims are targeted because of group membership, but there is not necessarily an intent to destroy the group as such	168
d)	Application—genocide	168
i)	Srebrenica massacre was genocide (<i>Krstić</i> case)	168
	(1) application—inferring genocidal intent—proper to consider the long-term impact that the elimination of the men would have on the survival of the community	169
	(2) application—inferring genocidal intent—targeting of military-aged men not driven solely by military rationale	170
	(3) application—inferring genocidal intent—forcible transfer	171
ii)	Srebrenica massacre was genocide (<i>Blagojević and Jokić</i> case)	172
	(1) application—inferring genocidal intent—forcible transfer	172
iii)	removal of Bosnian Muslims and Bosnian Croats from the Autonomous Region of Krajina not genocide	174

(1)	application—inferring genocidal intent—mass deportations insufficient as evidence of special intent to commit genocide where there was an extremely high number of individuals displaced compared to the number of individuals killed	174
(2)	application—inferring genocidal intent—targeting of military-aged men suggested no genocidal intent	175
(3)	application—inferring genocidal intent—the existence of a plan or policy	175
(4)	application—inferring genocidal intent—the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct	176
(5)	application—inferring genocidal intent—utterances of the accused	176
iv)	killings in Prijedor (including at Omarska, Keraterm and Trnopolje camps), not genocide	177
(1)	application—inferring genocidal intent—insufficient evidence of genocidal intent of higher level perpetrators presented in the <i>Stakić</i> case	177
(2)	application—inferring genocidal intent—insufficient evidence of intent to destroy part of group where approximately 23,000 persons registered to have passed through Trnopolje camp and 3,000 killed in Prijedor	178
(3)	application—inferring genocidal intent—lack of evidence of hateful statements by the accused	179
e)	Underlying offenses	179
i)	killing members of the group (Article 4(2)(a))	179
(1)	“killing” equated with “murder”	179
(2)	killing must be of members of the protected group	179
(3)	proof of result required	179
(4)	<i>mens rea</i> —must be intentional but not necessarily premeditated	179
(5)	application—killing	180
ii)	causing serious bodily or mental harm to members of the group (Article 4(2)(b))	180
(1)	defined	180
(2)	harm need not be permanent or irremediable, but it must cause grave and long-term disadvantage/be serious	180
(3)	must assess on a case-by-case basis	181
(4)	acts included	181
(5)	proof of result required	181
(6)	<i>mens rea</i> —the harm must be inflicted intentionally	181
(7)	application—causing serious bodily or mental harm to members of the group	182
(a)	trauma and wounds suffered by individuals who survived Srebrenica mass executions constitute serious bodily and mental harm	182
(b)	forced displacement of women, children, and elderly from Srebrenica was a traumatic experience which caused serious mental harm	182

iii)	deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Article 4(2)(c))	184
(1)	group must be a protected group.....	184
(2)	covers methods of destruction by which the perpetrator does not immediately kill group members, but which, ultimately, seek their physical destruction	184
(3)	examples of acts covered.....	185
(4)	does not require proof of physical destruction in whole or in part of the targeted group.....	185
(5)	whether deportation included.....	185
(6)	application—deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.....	185
iv)	imposing measures intended to prevent births within the group (Article 4(2)(d)).....	186
v)	forcibly transferring children of one group to another group (Article 4(2)(e))	186
f)	Punishable acts/modes of responsibility for committing genocide.....	186
i)	genocide (Article 4(3)(a)).....	186
ii)	conspiracy to commit genocide (Article 4(3)(b))	186
iii)	direct and public incitement to commit genocide (Article 4(3)(c))	186
iv)	attempt to commit genocide (Article 4(3)(d)).....	187
v)	complicity to commit genocide (Article 4(3)(e))	187
(1)	complicity and accomplice liability generally have same meaning.....	187
(a)	complicity broader than just aiding and abetting.....	187
(2)	accomplice defined	188
(a)	aiding and abetting genocide compared.....	188
(3)	Genocide Convention and customary international law provide for complicity regarding genocide	188
(4)	whether complicity in genocide requires a showing of genocidal intent	189
(5)	complicity in genocide requires that genocide be committed.....	189
(6)	may be prosecuted for complicity where perpetrator of genocide has not been tried or identified.....	190
(7)	may not be convicted of both genocide and complicity in genocide for the same acts	190
(8)	application—complicity in genocide.....	190
vi)	overlap between Article 4(3) and Article 7(1).....	191
IV)	CRIMES AGAINST HUMANITY (Article 5)	192
a)	Statute.....	192
b)	General elements	193
i)	jurisdictional prerequisites	194
(1)	the Statute requires that there be an armed conflict.....	194
(a)	the armed conflict may be international or internal.....	194
(b)	armed conflict defined	194

	(2) the acts of the accused and the armed conflict must be linked geographically as well as temporally.....	195
ii)	there must be an “attack” (element 1).....	196
	(1) defined.....	197
	(2) “attack” and “armed conflict” are distinct.....	197
	(3) the “attack” may be, but need not be, part of the “armed conflict”.....	197
	(4) “attack” not limited to use of armed force.....	198
	(5) when establishing the attack, generally irrelevant that the other side committed atrocities or attack.....	199
	(6) application—there was an attack.....	200
iii)	the acts of the accused must form part of the attack (element 2).....	200
	(1) nexus.....	200
	(2) crimes must be related to/part of the attack not isolated acts of the accused.....	201
	(3) the acts need not be committed in the midst of, or at the height of, the attack.....	201
iv)	the attack must be “directed against any civilian population” (element 3).....	202
	(1) “directed against”.....	202
	(a) an attack is “directed against” a civilian population if the civilian population is the primary object of the attack.....	202
	(b) not entire population, but a sufficient number must be subject to the attack, rather than a limited and randomly selected number of individuals.....	203
	(c) factors for assessing whether the attack was directed against the civilian population.....	203
	(d) attack directed against a civilian population will most often occur at the behest of a state.....	204
	(e) targeting a number of political opponents insufficient.....	204
	(f) the laws of war provide a benchmark to assess the nature of the attack and legality of acts committed.....	205
	(2) civilian population.....	205
	(a) defined.....	206
	(b) population must be “predominantly” civilian.....	206
	(c) construe civilian population liberally/cases of doubt.....	206
	(d) those excluded from civilian status.....	207
	(i) member of armed group, even if not armed or in combat, not a civilian.....	208
	(e) civilian includes those who were members of a resistance movement, former combatants, and others <i>hors de combat</i>	209
	(f) to determine whether presence of soldiers deprives population of its civilian nature, examine number of soldiers and whether they are on leave.....	209
	(g) protects “any” civilian population.....	210
	(3) application—attack directed against a civilian population.....	211
	(a) abduction, detention or mistreatment of Serbian civilians by the Kosovo Liberation Army.....	211

	(i)	perceived collaborators generally entitled to civilian status.....	211
	(ii)	abductions, detentions or mistreatment not on a scale or frequency to be considered an attack directed against a civilian population	211
	(b)	events in Prijedor constituted an attack directed against a civilian population.....	212
v)		the attack must be “widespread or systematic” (element 4).....	213
	(1)	widespread <i>or</i> systematic.....	213
	(2)	only the attack, not the accused’s acts, must be widespread or systematic	213
	(3)	widespread.....	214
	(4)	systematic	214
	(5)	assessing widespread or systematic	215
	(a)	factors to consider	215
	(6)	single act, if linked to a widespread or systematic attack, may qualify as a crime against humanity	216
	(7)	no plan or policy required, although may be useful to show the attack was widespread or systematic	217
	(a)	a level of <i>de facto</i> control over territory necessary to demonstrate that a sub-state unit or armed opposition group has a policy to direct an attack	218
	(8)	both civilian status of the victims and scale or level of organization characterize a crime against humanity	219
	(9)	application—widespread or systematic attack.....	219
	(a)	attacks carried out by Croats against the Bosnian Muslim civilian population in Central Bosnia widespread, systematic and directed against a civilian population	219
	(b)	there was a widespread or systematic attack against the Bosnian Muslim and Bosnian Croat civilian population in the Bosnian Krajina.....	220
	(c)	plan to rid Prijedor municipality of non-Serbs was a widespread and systematic attack against the civilian population	221
vi)		<i>mens rea</i> (element 5).....	222
	(1)	intent.....	222
	(a)	the perpetrator must have intent to commit the underlying offense(s)	222
	(b)	discriminatory intent only required for persecution	223
	(2)	knowledge	224
	(a)	the perpetrator must knowingly participate in a widespread or systematic attack, <i>i.e.</i> , have knowledge of the attack and that his act is part of the attack.....	224
	(b)	it does not suffice that the perpetrator knew of the attack and took the risk his acts were part of it.....	225
	(c)	knowledge of the details of the attack not required	226
	(d)	no requirement that the perpetrator approve of the context or share the purpose or goal behind the attack.....	226
	(e)	motive generally irrelevant.....	227

	(f)	it is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against the victim	228
	(g)	evidence of knowledge will vary from case to case	228
	(h)	whether there are factors from which to infer knowledge of context	228
	(i)	application— <i>mens rea</i> whether the acts of the accused formed part of a widespread and systematic attack and the accused knew of the attack	229
c)	Application—general requirements for Article 5		230
	i)	Srebrenica	230
		(1) armed conflict	230
		(2) widespread or systematic attack	230
		(3) directed against a civilian population	230
		(4) acts of the accused were part of the attack and the accused knew their acts were part of the attack	230
	ii)	Sarajevo	231
	iii)	Bosanski Samac and Odzak	231
		(1) attack on the civilian population and existence of armed conflict	231
		(2) the attack was widespread and systematic	232
		(3) the accuseds' knowledge of the attack and that their acts were part of the attack	232
d)	Underlying offenses		233
	i)	murder (Article 5(a))	233
		(1) elements	233
		(2) "murder" under Article 5 of the Statute, compared to Article 2 ("willful killing") and Article 3 ("murder")	234
		(3) proof of dead body not required	235
		(4) suicide as murder	235
		(5) <i>mens rea</i>	236
		(a) "murder" not "premeditated murder" is the underlying offense	236
		(6) application—murder	237
		(a) Srebrenica	237
		(b) Sarajevo	237
		(c) Prijedor	237
	ii)	extermination (Article 5(b))	238
		(1) relationship to crimes of murder (Articles 3 and 5) and willful killing (Article 2)	238
		(2) elements	238
		(3) <i>actus reus</i>	239
		(a) may include acts such as the deprivation of food and medicine, calculated to cause the destruction of part of the population	239
		(b) number of individuals involved	240
		(i) application—number of victims: at least 1669 Bosnian Muslims and Bosnian Croats killed by Bosnian Serb forces in the Autonomous Region of Krajina	241

	(c)	extermination must be collective, not directed toward singled out individuals.....	242
	(d)	responsibility may be remote or indirect/ not required to prove the accused had <i>de facto</i> control over a large number of individuals.....	242
	(4)	<i>mens rea</i>	242
	(a)	discriminatory intent not required.....	243
	(5)	no plan or policy requirement/“vast scheme of collective murder” or “vast murderous enterprise” not an element.....	244
	(6)	application—extermination.....	245
	(a)	Srebrenica—killing more than 7,000 thousand Bosnian Muslim men and boys was extermination.....	245
	(b)	Prijedor—killing more than 1,500, including at the Keraterm camp, at Koricanske Stijene on Mount Vlasic, and the village of Brisevo was extermination	246
	(i)	application— <i>mens rea</i> —extermination: Prijedor.....	246
	(7)	extermination distinguished from genocide.....	247
iii)		enslavement (Article 5(c)).....	247
	(1)	<i>actus reus</i> and <i>mens rea</i>	247
	(2)	same as “slavery” under Article 3.....	248
	(3)	indicia of enslavement.....	248
	(a)	keeping someone in captivity usually not enough.....	248
	(b)	duration of enslavement is a factor, but not a required element	248
	(4)	lack of resistance is not a sign of consent; lack of consent is not an element.....	249
	(5)	forced labor assignments may constitute slavery	249
iv)		deportation (Article 5(d)).....	250
	(1)	defined.....	250
	(2)	distinction between deportation and forcible transfer	250
	(3)	transfer over <i>de facto</i> boundaries that are not internationally recognized, such as constantly changing frontlines.....	251
	(4)	unlawful character of the displacement—when displacement is involuntary	252
	(5)	assistance by humanitarian agencies does not render displacement lawful	253
	(6)	need not involve a minimum number of individuals	253
	(7)	return of victim has no impact on criminal responsibility.....	253
	(8)	<i>mens rea</i>	254
	(9)	application—deportation.....	254
	(a)	deportation of the non-Serb population from the Municipality of Prijedor	254
	(b)	deportation of non-Serb civilians from the Municipality of Bosanski Samac to Croatia	254
	(i)	involuntary character of the exchanges/lack of genuine consent.....	255
v)		imprisonment (Article 5(e)).....	256
	(1)	elements.....	256
	(2)	requires “arbitrary” imprisonment	257
	(3)	same elements as “unlawful confinement” under Article 2	258

vi)	torture (Article 5(f)).....	258
(1)	same regardless of Article.....	258
(2)	elements.....	258
(3)	requirement of severe pain and suffering.....	258
(a)	rape necessarily implies severe pain or suffering.....	259
(4)	requirement of a prohibited purpose.....	260
(a)	prohibited purpose need not be the predominating or sole purpose.....	260
(5)	role of a state official not necessary.....	261
(6)	<i>mens rea</i>	262
(7)	distinction between cruel and inhumane treatment as an underlying act of persecution, and torture.....	262
vii)	rape (Article 5(g)).....	263
viii)	persecution (Article 5(h)).....	263
(1)	elements.....	263
(2)	<i>actus reus</i>	265
(a)	persecutory acts include those listed in Article 5, acts found elsewhere in the Statute and acts not expressly prohibited under the Statute.....	265
(b)	acts or omissions not enumerated in Article 5 must be of equal gravity to those listed.....	266
(c)	separately or combined, the acts must amount to persecution.....	267
(d)	the acts underlying persecution, separately or combined, must constitute a denial of, or infringement upon, a fundamental right under international customary law.....	269
(e)	acts may encompass physical or mental harm or infringements upon individual freedom, as well as acts which appear less serious.....	270
(f)	act is discriminatory where victim targeted because of group membership.....	271
(g)	targeted individuals may include those defined by the perpetrator as belonging to the victim group due to their close affiliations to, or sympathies for, the victim group.....	271
(h)	each of the three grounds listed in Article 5(h) sufficient.....	271
(i)	actual discrimination must result.....	271
(i)	application—actual discrimination against the detainees in the Omarska camp and the non- Serb population of Prijedor.....	272
(j)	mistaken target of persecution is still persecution.....	273
(k)	single act may constitute persecution if discriminatory intent proven.....	274
(i)	application—single act may constitute persecution: murder at the Drina River, in the municipality of Visegrad in south-eastern Bosnia-Herzegovina.....	274

(l)	prosecution must charge particular acts or omissions amounting to persecution	275
(3)	examples of persecution	276
(a)	destruction of property or means of subsistence.....	276
(i)	prohibition of pillage is customary international law.....	276
(ii)	destruction of property, depending on the nature and extent of the destruction, may be of equal gravity to other crimes listed in Article 5.....	276
(iii)	examine severity of impact	277
(iv)	various acts covered, including plunder and looting that render a people homeless and with no means of economic support	277
(v)	institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.....	279
(vi)	application—equal gravity	279
(vii)	application—destruction of property generally.....	280
(a)	Autonomous Region of Krajina.....	280
(b)	Srebrenica.....	280
(c)	Bosanski Samac.....	281
(d)	Prijedor municipality.....	282
(b)	unlawful arrest.....	282
(i)	application—unlawful arrest: Bosanski Samac.....	283
(c)	unlawful detention	283
(i)	application—unlawful detention	284
(a)	Lasva River Valley region in central Bosnia	284
(b)	Bosanski Samac, north-eastern Bosnia and Herzegovina.....	284
(c)	Ahmici, located in the municipality of Vitez in the Lasva River Valley in central Bosnia and Herzegovina.....	285
(d)	unlawful confinement.....	285
(i)	application—unlawful confinement: Municipalities of Bosanski Samac and Odzak.....	286
(c)	deportation, forcible transfer and forcible displacement.....	286
(i)	are crimes of equal gravity to other crimes listed in Article 5.....	286
(ii)	displacements punishable under customary international law	287
(iii)	deportation, forcible transfer and forcible displacement defined.....	287
(a)	forcible displacement not limited to displacements across a national border.....	288

(b)	error of law not to examine whether forcible displacement constituted a crime under customary international law at the time committed.....	289
(vi)	elements.....	289
(vii)	assessing voluntariness of displacement.....	289
(viii)	application—lack of possibility of genuine consent.....	290
(a)	KP Dom Prison Complex in Foca, located in Bosnia and Herzegovina.....	290
(b)	Srebrenica.....	291
(ix)	location to which victim is displaced must be sufficiently distant.....	291
(x)	evacuation is permissible to ensure the security of the population or for imperative military reasons.....	292
(xi)	evacuation is permissible for humanitarian reasons.....	292
(xii)	obligations incumbent upon the evacuating party.....	293
(xiii)	<i>mens rea</i>	293
(xiv)	subsequent voluntary return does not impact on criminal responsibility.....	294
(xv)	application—deportation, forcible transfer and forcible displacement.....	294
(a)	from Foca municipality.....	294
(b)	from Srebrenica.....	295
(c)	from Banja Luka, Prijedor, Sanski Most and Bosanski Novi in the Autonomous Region of Krajina.....	296
(d)	from the Serbian Autonomous Region of Krajina.....	297
(f)	harassment, humiliation, degradation, and psychological abuse.....	298
(i)	application—harassment, humiliation, degradation and psychological abuse.....	299
(a)	the Omarska Camp.....	299
(b)	camps and detention facilities in the Autonomous Region of the Krajina.....	300
(c)	the Omarska, Keraterm and Trnopolje camps.....	301
(g)	murder.....	301
(i)	application—murder.....	302
(a)	Srebrenica.....	302
(b)	Autonomous Region of Krajina.....	303
(c)	Municipality of Prijedor.....	303
(h)	torture.....	303
(i)	application—torture.....	304
(a)	camps and detention facilities in the Autonomous Region of Krajina.....	304

	(b)	detention facilities in Bosanski Samac, Crkvina, Brcko, Bijeljina.....	305
	(c)	the Omarska, Keraterm and Trnopolje camps and elsewhere.....	305
(i)		cruel and inhumane treatment	306
	(i)	defined	306
	(ii)	elements	306
	(iii)	customary international law.....	306
	(iv)	acts of serious bodily and mental harm are of sufficient gravity compared to the other crimes enumerated in Article 5.....	306
	(a)	application—gravity.....	306
	(v)	determining seriousness/severity of the harm suffered.....	307
	(vi)	cruel and inhumane treatment is a lesser included offense of torture.....	307
	(vii)	beatings as a form of cruel and inhumane treatment	307
	(viii)	forced labor as a form of cruel and inhumane treatment	308
	(ix)	confinement under inhumane conditions as a form of cruel and inhumane treatment.....	308
	(x)	<i>mens rea</i>	309
	(xi)	application—cruel and inhumane treatment.....	309
	(a)	following the fall of Srebrenica	309
	(b)	beatings at detention facilities in Bosanski Samac and in Crkvina, Brcko, and Bijeljina.....	311
	(c)	confinement under inhumane conditions at detention centers in Bosanski Samac, Crkvina and Bijeljina	312
	(d)	forced labor—digging trenches, building bunkers, carry sandbags or railway sleepers for the construction of trenches, and building other fortifications on the frontline.....	312
	(e)	confinement under inhumane conditions at the Omarska camp	313
(j)		extermination.....	313
(k)		serious bodily and mental harm/ physical violence.....	313
	(i)	application—serious bodily and mental harm/ physical violence.....	314
	(a)	detention camps and facilities: the Manjaca Camp; the Mlavke football stadium and Bosanski Novi fire station in Bosanski Novi; the Kotor Varos Prison in Kotor Varos; the Omarska, Keraterm and Trnopolje camps in Prijedor; the Sloga shoe factory in Prnjavor; Betonirka in Sanski Most; and Pribinic and Territorial Defense buildings in Teslic	314

	(b) the Omarska, Keraterm and Trnopolje camps.....	315
(l)	rape.....	315
	(i) application—rape.....	316
	(a) municipalities of Prijedor, Teslic, Banja Luka, Bosanska Krupa, Donji Vakuf, and in Kotor Varos.....	316
	(b) the Trnopolje, Keraterm and Omarska camps.....	316
(m)	sexual assault.....	317
	(i) application—sexual assault in various prison camps and complexes including the Omarska and Keraterm camps and other detention facilities in the Prijedor area.....	317
(n)	terrorizing the civilian population.....	318
	(i) elements.....	318
	(ii) actual infliction of terror unnecessary.....	318
	(iii) primary purpose must be spreading terror.....	318
	(iv) terrorization violates a fundamental right laid down in international customary and treaty law.....	318
	(v) application—terrorizing the civilian population.....	319
	(a) Srebrenica and Potocari.....	319
(o)	attacks launched deliberately against civilians or civilian objects/attacks on civilians, cities, towns and villages.....	320
(p)	forced labor.....	321
	(i) permissible work distinguished.....	321
	(ii) application—forced labor.....	322
	(a) KP Dom prison complex in Foca.....	322
	(b) Bosanski Samac, Brijeljina, Grebnice, Zasavica, Pisaria, Lijekovica, Brvnik, Prud, Teocak.....	323
	(c) Bosanski Samac, Zasavica, Novi Grad, Pisari and other neighboring villages, and Odzak—not forced labor.....	324
(q)	forcible transfer, sexual violence, subjection to inhumane conditions and atmosphere of terror.....	324
	(i) application—the Susica camp.....	324
(r)	killings, beatings, unlawful attacks on civilians and civilian objects, the unlawful imprisonment of civilians, destruction of civilian objects, and looting.....	324
(s)	political, social, economic rights violations, including the right to employment, right to freedom of movement, right to proper judicial process, and right to proper medical care.....	325
	(i) rights violations need not be set out in the ICTY Statute.....	325
	(ii) evaluate rights violations on a case by case basis to determine gravity, considering the cumulative effect of the violations.....	326

(iii)	application—violations of the right to employment, the right to freedom of movement, the right to proper judicial process and the right to proper medical care	326
(t)	issuance of discriminatory orders, policies, decisions or other regulations.....	326
(u)	use of civilians as hostages and human shields	327
(v)	summary of acts covered	327
(w)	acts that alone did not rise to the level of persecution: encouraging and promoting hatred on political grounds; dismissing and removing individuals from government; forcible takeover; and interrogations.....	327
(4)	<i>mens rea</i> for persecution	328
(a)	discriminatory intent required for persecution.....	328
(b)	<i>mens rea</i> requirement for persecution higher than for other crimes against humanity, but lower than for genocide.....	330
(c)	intent to target group, not individuals	330
(d)	discriminatory intent may be shown by political, racial or religious discrimination	331
(e)	discriminatory intent may be shown by positive or negative criteria.....	331
(f)	inferring discriminatory intent	331
(i)	discriminatory intent may not be inferred directly from the general discriminatory nature of an attack.....	331
(ii)	discriminatory intent may be inferred from the context of the attack if it is substantiated by surrounding circumstances	332
(iii)	factors to consider.....	332
(iv)	intent may be inferred from a perpetrator's knowing participation in a system	333
(v)	application—inferring discriminatory intent from the fact that beatings were inflicted only on non-Serb prison detainees.....	333
(g)	no requirement of discriminatory policy.....	333
(h)	persecutory intent—the removal of targeted persons from society or humanity—not required	334
(i)	knowledge that one is acting in a way that is discriminatory is insufficient; must intend to discriminate	334
(j)	intent to discriminate need not be the primary intent, but must be a significant one	335
(k)	personal motives irrelevant to finding of intent.....	335
(i)	application—personal motives: the Omarska camp.....	335
(l)	generally, discriminatory intent must relate to the act charged as persecution, not the attack.....	336

	(i)	where indirect perpetrator, proof is required only of general discriminatory intent in relation to the attack.....	337
(m)		<i>mens rea</i> for ordering, planning or instigating crime of persecution.....	338
(n)		<i>mens rea</i> for crime of persecution where joint criminal enterprise / <i>mens rea</i> for aider and abettor of persecution.....	338
(o)		application—persecution— <i>mens rea</i>	339
	(i)	the Omarska, Keraterm and Trnopolje camps.....	339
	(ii)	Prijedor municipality.....	340
	(iii)	the Drina River incident in the municipality of Visegrad in south-eastern Bosnia-Herzegovina.....	340
	(iv)	detention of non-Serbs in the KP Dom prison complex in Foca, Bosnia-Herzegovina.....	341
(5)		application—persecution as a crime against humanity.....	342
	(a)	Srebrenica massacre and related crimes.....	342
	(b)	attack on Muslim residents of Glogova in the Municipality of Bratunac with the goal of taking over territory in Bosnia-Herzegovina.....	344
	(i)	underlying acts.....	344
	(ii)	intent.....	344
	(iii)	existence of a widespread or systematic attack against a civilian population and knowledge that the acts form part of that attack.....	344
	(iv)	armed conflict.....	345
ix)		other inhumane acts (Article 5(i)).....	345
	(1)	generally.....	345
	(2)	part of international customary law.....	345
	(3)	potential <i>nullum crimen sine lege</i> issue.....	346
	(4)	elements.....	347
	(a)	factors for assessing seriousness of the act.....	348
	(b)	no requirement that the suffering have long term effects.....	348
	(c)	<i>mens rea</i>	349
(5)		equivalent to “cruel treatment” under Article 3 and “inhumane treatment” under Article 5.....	349
(6)		acts covered.....	350
	(a)	forcible displacement and forcible transfer.....	350
	(i)	distinction between deportation, forcible transfer and forced displacement.....	350
	(ii)	coercion required for both deportation and forcible transfer.....	350
	(iii)	displacement must be unlawful.....	351
	(iv)	<i>mens rea</i>	351
	(b)	mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance.....	351

	(c)	serious physical and mental injury	351
	(d)	removal of individuals to detention facilities excluded	351
	(e)	application—other inhumane acts	352
	(i)	forcible transfer of women and children from Srebrenica to Kladanj	352
	(ii)	campaign of sniping, artillery fire and mortar attacks on civilians in Sarajevo	352
V)		INDIVIDUAL RESPONSIBILITY (Article 7(1))	352
a)		Statute	352
b)		Generally	352
c)		Planning, instigating, ordering, committing	353
	i)	planning	353
	(1)	<i>actus reus</i>	353
	(a)	planning must substantially contribute to the crime	354
	(b)	person who committed crime may not also be held responsible for planning it	354
	(c)	circumstantial evidence may prove plan	354
	(2)	<i>mens rea</i>	354
	ii)	instigating	355
	(1)	<i>actus reus</i>	355
	(a)	requires a clear/ substantial contribution to the conduct of the other person, but unnecessary to show that the crime would not have occurred without the accused's involvement	355
	(i)	application of causal link	356
	(b)	both positive acts and omissions may constitute instigating, as well as express and implied conduct	356
	(2)	<i>mens rea</i>	357
	(3)	application—instigating	357
	iii)	ordering	358
	(1)	<i>actus reus</i>	358
	(a)	no formal superior-subordinate relationship required, so long as the accused possessed <i>de jure</i> or <i>de facto</i> authority to order, or that authority may be implied	358
	(b)	order need not be given directly to person who performs the offense	359
	(c)	order need not be in writing or in any particular form	359
	(d)	order may be proven through circumstantial evidence	359
	(e)	order may be explicit or implicit	359
	(f)	factors from which to infer ordering	359
	(g)	causal link between ordering and perpetration of a crime needed	360
	(h)	conviction for ordering not appropriate where the accused committed the same crime	360
	(i)	whether ordering may be based on an omission	360
	(2)	<i>mens rea</i>	361
	(a)	<i>mens rea</i> may be inferred	362
	(3)	application—ordering	363

	(a)	trench digging in the municipalities of Kiseljak, Busovaca and Vitez	363
	(b)	campaign of sniping and shelling attacks against civilians in Sarajevo.....	364
	(c)	Old Town of Dubrovnik and Srd	365
iv)	committing.....		366
	(1)	generally.....	366
	(2)	joint criminal enterprise is a form of commission, although commission is broader than joint criminal enterprise	366
	(3)	<i>actus reus</i>	367
	(a)	involves direct personal or physical participation or a culpable omission.....	367
	(b)	there may be several perpetrators of the same crime	368
	(c)	the accused need not participate in all aspects of the crime	368
	(4)	<i>mens rea</i>	368
v)	planning, instigating, ordering and committing— <i>mens rea</i> generally		368
vi)	acts under Article 7(1) may be done through a positive act or culpable omission.....		369
	(1)	application—use of human shields as omission	370
d)	Aiding and abetting		370
	i)	generally.....	370
	ii)	based on customary international law.....	370
	iii)	defined.....	371
	(1)	difference between aiding and abetting	371
iv)	<i>actus reus</i>		372
	(1)	requires practical assistance, encouragement or moral support.....	372
	(2)	may occur through an omission	372
	(3)	cause-effect relationship not required, but must have a substantial effect on the commission of the crime	373
	(4)	assistance may occur before, during or after the act is committed	374
	(5)	actual physical presence not required	374
	(6)	the aider and abettor will be responsible for all that naturally results from his act.....	375
	(7)	presence at scene.....	375
	(a)	not aiding and abetting unless it bestows legitimacy on, or provides encouragement to, perpetrator/has a significant encouraging effect	375
	(b)	example of encouraging effect	376
	(c)	presence of superior may, in some circumstances, be interpreted as approval of conduct	376
	(8)	aider and abettor may be convicted where principal offender has not been tried or identified, but acts of principal offender must be established.....	377
	(9)	no proof of a plan or agreement is required.....	377
	(10)	principal need not be aware of accomplice's contribution.....	378
v)	<i>mens rea</i>		378
	(1)	must have knowledge that acts will assist principal perpetrator's crime.....	378

	(2)	need not share principal's intent, but must be aware of essential elements of the crime, including the principal's mental state.....	379
	(3)	need not know precise crime intended or committed.....	380
	(4)	<i>mens rea</i> may be deduced from circumstances, such as position of authority and presence	381
	(5)	<i>mens rea</i> must exist at the time of the planning, preparation or execution of the crime.....	381
	(6)	<i>mens rea</i> for aider and abettor of persecution	382
	(7)	<i>mens rea</i> for aider and abettor of genocide.....	382
vi)		aiding and abetting genocide—elements.....	384
	(1)	difference between complicity in genocide and aiding and abetting genocide	384
vii)		application—aiding and abetting.....	385
	(1)	genocide at Srebrenica.....	385
	(2)	murder at the Drina River in the municipality of Visegrad, south-eastern Bosnia-Herzegovina	388
	(3)	cruel treatment and torture at the Ilapushnik/Lapusnik prison camp in central Kosovo.....	388
	(4)	shelling of the Old Town of Dubrovnik, Croatia.....	389
	(5)	additional situations	389
	(6)	reburial operation after Srebrenica massacre not <i>ex post facto</i> aiding and abetting.....	389
e)		Joint criminal enterprise/ the common purpose doctrine	390
i)		generally.....	390
	(1)	rationale for joint criminal enterprise doctrine.....	392
	(2)	joint criminal enterprise is customary international law.....	393
	(3)	joint criminal enterprise is a form of “commission”.....	393
	(4)	rationale why joint criminal enterprise is not a new crime unforeseen in the Statute	394
	(5)	not error to use term “accomplice” instead of “co-perpetrator” in a joint criminal enterprise.....	395
	(6)	joint criminal enterprise is a means of committing a crime, not a crime in itself	396
ii)		the three categories of joint criminal enterprise/ common purpose doctrine.....	396
	(1)	first category (“basic”).....	396
	(2)	second category (“systemic”).....	397
	(a)	second category not limited to detention camps similar to concentration camps.....	398
	(3)	third category (“extended”).....	399
iii)		elements— <i>actus reus</i> —all three types of joint criminal enterprise	400
	(1)	need to establish that a plurality of persons were involved (element 1)	402
	(a)	the persons need not be organized in a military, political or administrative structure.....	402
	(2)	need to establish existence of a mutual arrangement or understanding—a common plan or purpose (element 2).....	402

(a)	a common plan or purpose is an arrangement or agreement between two or more persons to commit a crime within the Statute.....	403
(b)	crime must result from the joint criminal plan.....	403
(c)	arrangement need not be express, but may be inferred from the fact that a plurality of persons acted in unison.....	404
(d)	there must be a <i>mutual</i> understanding or arrangement.....	404
(e)	to infer a common plan, it must be the only reasonable inference available from the evidence.....	405
(f)	common plan or purpose may materialize extemporaneously.....	405
(g)	purpose for entering into the common plan is irrelevant.....	405
(h)	when the objective changes, a new joint criminal enterprise exists.....	405
(i)	exception: second type of joint criminal enterprise (“systemic”) needs no proof of an agreement.....	406
(3)	participation of the accused in the common plan (element 3).....	407
(a)	participation may take various forms.....	408
(b)	participant in a joint criminal enterprise need not physically commit or participate in any crime.....	409
(c)	level of participation in joint criminal enterprise generally need not be significant or substantial.....	410
(i)	in practice, significance of participation may be relevant to demonstrating shared intent.....	411
(ii)	exception: where there is an opportunistic visitor, a substantial contribution to the overall effect of the camp is necessary.....	411
(d)	level of participation for aider and abettor: must have a substantial effect.....	412
(e)	participant must perform acts directed at furthering or in furtherance of the common plan or purpose.....	412
(f)	participant in a joint criminal enterprise need not be physically present during crime.....	412
(i)	application—could be convicted of crimes while absent from the Omarska camp.....	413
(ii)	application—could not be convicted of murder that may have occurred before arrival at the Omarska camp.....	413
(g)	all participants equally guilty regardless of part played.....	414
(h)	participation not satisfied by mere membership in an organization.....	414
(i)	not necessary to show offense would not have occurred but for the accused’s participation, but involvement must form a link in the chain of causation.....	415
(j)	inability to improve camp conditions/prevent crimes irrelevant where accused supported and furthered a joint criminal enterprise.....	415
(i)	application—the Omarska camp.....	415

(k)	leadership position/superior responsibility not required, but is relevant to determine scope of participation or as an aggravating circumstance.....	416
(i)	application—the Omarska camp.....	416
(l)	actual duties not job title used to determine participation in joint criminal enterprise	417
(i)	application—the Omarska camp.....	417
iv)	<i>mens rea</i>	417
(1)	generally	417
(2)	first type (“basic”): must prove common state of mind.....	418
(a)	inference of state of mind must be the only reasonable inference available.....	419
(b)	not necessary to show complete agreement to every crime committed, however, must be common plan to commit the crime charged.....	420
(c)	application—inferring intent for first type joint criminal enterprise: murder at the Drina River, municipality of Visegrad, south-eastern Bosnia and Herzegovina—intent not properly inferred.....	420
(3)	second type (“systemic”): need to prove personal knowledge of the system of ill-treatment and intent to further that system	421
(a)	inferring intent.....	422
(b)	motive immaterial	423
(i)	application—the Omarska camp.....	423
(c)	irrelevant that accused neither wanted nor contributed to the infliction of severe pain or suffering where contributed to operation and maintenance of joint criminal enterprise	424
(i)	application—the Omarska camp.....	424
(d)	participant in a joint criminal enterprise need not know of each crime committed.....	424
(e)	infrequently assisting detainees not inconsistent with finding <i>mens rea</i>	425
(i)	application—Omarska camp.....	425
(f)	lack of awareness of crimes at outset of participation	425
(i)	application—Omarska camp.....	425
(4)	third type (“extended”): if the crime went beyond the scope of the joint criminal enterprise, must prove intent to participate, the crime was foreseeable, and the accused willingly took the risk that the crime might occur.....	426
(a)	crimes outside the joint criminal enterprise relevant where there is a second type of joint criminal enterprise.....	427
(5)	where crime requires special intent (such as persecution), must prove such intent.....	428
(6)	where joint criminal enterprise is to commit genocide	428
(a)	whether there can be a third type of joint criminal enterprise regarding genocide	428

	(b) distinguishing escalation to genocide from genocide as a natural and foreseeable consequence of a joint criminal enterprise not aimed at genocide	429
v)	application—joint criminal enterprise	429
	(1) first type of joint criminal enterprise—forced labor at KP Dom prison complex in Foca as a form of persecution.....	429
	(2) first type of joint criminal enterprise—forcible displacement involving KP Dom prison complex detainees as a form of persecution.....	430
	(3) first type of joint criminal enterprise—common plan to persecute non-Serb civilians in the municipality of Bosanski Samac	431
	(4) second type of joint criminal enterprise—the Omarska camp	432
	(a) <i>actus reus</i>	432
	(i) contributing to the daily operation and maintenance of the Omarska camp furthered the common criminal purpose.....	432
	(ii) lawlessness and anarchy did not prevent finding of joint criminal enterprise.....	433
	(iii) visitor to camp did not participate in a significant way in the functioning of the camp	433
	(b) <i>mens rea</i>	433
	(5) second type of joint criminal enterprise—KP Dom prison complex	434
	(a) personal situation did not negate finding of <i>mens rea</i>	435
	(6) third type of joint criminal enterprise—permanent and forcible removal of the majority of Croat and other non-Serb civilians from the so-called Serbian Autonomous District of Krajina (approximately one-third of Croatia)	436
	(a) <i>actus reus</i>	436
	(b) <i>mens rea</i>	437
	(7) third type of joint criminal enterprise—crimes in Potocari as a natural and foreseeable consequence of the “Kričava 95 operation”	438
vi)	difference between “aiding and abetting,” and “co-perpetration in a joint criminal enterprise” (<i>i.e.</i> , acting pursuant to a common design or purpose).....	438
	(1) generally.....	438
	(2) <i>actus reus</i> distinguished	439
	(3) <i>mens rea</i> distinguished.....	440
	(4) distinction depends on the effect of the assistance and on the knowledge of the accused.....	441
	(5) when an aider or abettor becomes a co-perpetrator.....	441
	(6) responsibility of an aider and abettor is less than a participant in a joint criminal enterprise.....	441
	(7) distinguishing a co-perpetrator from an aider and abettor of torture	442
	(8) application—difference between aiding and abetting genocide at Srebrenica and responsibility as a participant in a joint criminal enterprise	443

vii)	whether one may aid and abet a joint criminal enterprise	443
(a)	application—murder at the Drina River, municipality of Visegrad, south-eastern Bosnia and Herzegovina.....	444
viii)	whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability.....	445
VI)	COMMAND RESPONSIBILITY (Article 7(3))	446
a)	Statute	446
b)	Generally	446
i)	command responsibility is customary international law	446
ii)	command responsibility applies to all acts covered in Articles 2-5	446
iii)	command responsibility applies in both international and internal armed conflicts	447
iv)	purpose behind command responsibility	447
v)	history—duty of responsible command.....	447
vi)	responsibility attaches to a commander for dereliction of duty	448
vii)	distinguishing responsibility under Article 7(1) and Article 7(3)	449
c)	Elements	450
i)	the existence of a superior-subordinate relationship (element 1).....	450
(1)	the superior-subordinate relationship is based on the power to control the actions of subordinates.....	451
(2)	effective control required.....	451
(3)	effective control measured by the ability to prevent and/or punish the crimes	452
(4)	may be <i>de jure</i> or <i>de facto</i> power to control	453
(a)	<i>de jure</i> authority without effective control insufficient	454
(b)	<i>de facto</i> authority with effective control sufficient	455
(c)	degree of <i>de facto</i> authority must be equivalent to <i>de jure</i> authority	455
(d)	substantial influence that is short of effective control insufficient	456
(e)	factors to assess for determining effective control.....	456
(i)	the giving of orders or exercise of powers generally attached to a military command are strong indications of command	457
(5)	relationship most obviously characterized by a formal hierarchical relationship	457
(6)	relationship to subordinates may be direct or indirect.....	457
(a)	includes a subordinate two levels down in the chain of command	458
(7)	relationship may include command of informal structures/need not be formalized.....	459
(8)	temporary nature of military unit does not exclude relationship.....	460
(9)	a superior who has effective control but fails to exercise it can be held responsible	461
(10)	more than one superior may be held responsible.....	461
(11)	analyze authority on a case-by-case basis	461
(12)	application to civilian leaders	462

	(a)	command responsibility applies to civilian leaders	462
	(b)	need superior-subordinate relationship	462
	(c)	need effective power to control the perpetrators	462
	(d)	influence is insufficient	463
	(e)	disciplinary power to be interpreted broadly	463
	(f)	only applies where degree of control is similar to that of military commanders	464
(13)		application—the superior-subordinate relationship	464
	(a)	command responsibility for JNA (Yugoslav Peoples' Army) forces involved in the attack on Srd and the shelling of Dubrovnik, including the Old Town	464
	(b)	command responsibility for the Sarajevo Romanija Corps troops deployed around Sarajevo	465
	(c)	no command responsibility for crimes in Ahmici, Santici, Pirici, and Nadioci on April 16, 1993 where Appellant took the measures reasonable within his material ability to denounce the crimes and requested an investigation	466
	(d)	no command responsibility over Army of the Republic of Bosnia and Herzegovina troops in Grabovica and Uzdol	467
ii)		<i>mens rea</i> (element 2)	467
	(1)	actual knowledge	468
	(a)	knowledge may be proven through direct or circumstantial evidence	468
	(b)	factors for assessing actual knowledge	469
	(c)	evidence required to demonstrate actual knowledge may differ based on position of authority	469
	(d)	position of command relevant as indicia of accused's knowledge, but does not create strict liability	469
	(e)	the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove actual knowledge	470
	(f)	knowledge may be presumed if a superior had means to obtain information of a crime and deliberately refrained from doing so	470
	(g)	application—knowledge that subordinates were committing or about to commit crimes	471
	(i)	knowledge of General of Sarajevo Romanija Corps as to crimes committed by forces in Sarajevo	471
(2)		reason to know	472
	(a)	analyze whether information was available to the superior that would put him on notice	472
	(i)	general information that would put the superior on notice suffices	473
	(ii)	information need not be explicit or specific	473
	(b)	the information may be written or oral, and need not be a specific report	474

(c)	inquiry is whether superior is in possession of information; irrelevant whether he acquainted himself with it	474
(d)	superior has “reason to know” if the information available is sufficient to justify further inquiry	475
(e)	failing to acquire knowledge does not create criminal responsibility	475
(f)	however, superior may not deliberately refrain from obtaining information or remain “willfully blind” of the acts of subordinates	476
(g)	application—reason to know that subordinates were committing or about to commit crimes	477
(i)	torture at KP Dom prison complex in Foca	477
(ii)	murder at KP Dom prison complex in Foca	478
(3)	application—knew or reason to know that subordinates were committing or about to commit crimes	479
(a)	JNA (Yugoslav Peoples’ Army) artillery fire on Dubrovnik and attack on Srd	479
(b)	sniping and shelling of Sarajevo	481
(c)	attack on Stari Vitez and lorry bombing by the Vitezovi unit of the Croatian Defence Council—lack of <i>mens rea</i>	481
(4)	<i>mens rea</i> requirement same for civilian and military superiors	482
(5)	<i>mens rea</i> inquiry should be conducted on a case-by-case basis	482
(6)	criminal negligence not a basis of responsibility	482
(7)	superior responsibility may not be based on strict liability	483
iii)	the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3)	484
(1)	there are two distinct legal obligations	484
(2)	required to take necessary and reasonable measures	486
(a)	what measures the superior is required to take depend on the superior’s position of power	486
(b)	measures required are limited to what is feasible/within a superior’s material possibility	486
(c)	material ability to act and effective control determinative	487
(d)	explicit legal capacity is immaterial	488
(e)	what constitutes the measures required by the superior is a matter of evidence not substantive law	488
(f)	determination will vary from case to case	489
(g)	factors to consider in determining whether measures were necessary and reasonable	490
(h)	not required to prove the superior’s failure to act caused the subordinate’s crime	490
(3)	the duty to prevent	491
(a)	when duty to prevent arises	491
(b)	duty to prevent includes both a general and specific obligation	492
(c)	general preventative obligations of a commander	492

(d)	specific obligations to prevent: depends on superior's power	493
(e)	where unclear whether forces are about to commit crimes, duty to investigate arises	494
(f)	issuance of routine orders and occasional reiteration of obligation to respect Geneva Conventions insufficient.....	494
(g)	application—duty to prevent	494
(i)	illegal shelling of the Old Town of Dubrovnik	494
(ii)	campaign of sniping in Sarajevo by the Sarajevo Romanija Corps of the Army of Republika Srpska.....	495
(4)	the duty to punish.....	496
(a)	responsibility of commander for failure to punish recognized as customary law.....	496
(b)	when duty to punish arises	496
(c)	duty to punish is a separate form of responsibility.....	496
(d)	failure to punish may be tacit acceptance of crimes/punishment is an inherent part of prevention of future crimes.....	497
(e)	satisfying the duty to punish	497
(f)	lack of formal legal competence to exercise measures will not necessarily preclude criminal responsibility.....	498
(g)	superior need not be the person who dispenses punishment, but must take important step in disciplinary process.....	498
(h)	application—duty to punish.....	498
(i)	shelling of the Old Town of Dubrovnik	498
(ii)	campaign of sniping and shelling of Sarajevo.....	499
(5)	civilian superiors are under similar obligations to prevent and punish	500
d)	Superior responsibility for genocide	500
i)	superior criminal responsibility and crime of genocide recognized as customary international law.....	500
ii)	superior responsibility applies to the crime of genocide	500
iii)	<i>mens rea</i> for superior responsibility for the crime of genocide	501
e)	Application—superior responsibility.....	502
i)	unlawful shelling of the Old Town of Dubrovnik	502
ii)	executions following the fall of Srebrenica.....	503
iii)	holding Bosnian Muslims under unlawful conditions of detention at the Vitez Cultural Centre and the Vitez veterinary hospital in Central Bosnia.....	503
(1)	effective control	503
(2)	conditions of detention	504
(3)	actual knowledge of conditions	504
(4)	failure to punish	505

VII) AFFIRMATIVE DEFENSES..... 506

a)	“Alibi” defense.....	506
b)	Duress does not afford a complete defense	506

c)	<i>Tu quoque</i> principle rejected: the argument that the adversary committed similar crimes is not a valid defense.....	508
d)	Involvement in defensive operation is not a defense.....	508
e)	Diminished mental responsibility is not a defense	508
VIII)	JURISDICTION	509
a)	Generally.....	509
b)	Alleged illegal arrest did not deprive the Tribunal of jurisdiction.....	509
IX)	CHARGING, CONVICTIONS AND SENTENCING.....	513
a)	Cumulative charging.....	513
i)	cumulative charging permitted.....	513
b)	Cumulative and concurrent convictions	513
i)	cumulative convictions based on same conduct permitted only where each crime involves a materially distinct element	513
ii)	an element is materially distinct from another if it requires proof of a fact not required by the other.....	514
iii)	determination of whether each provision contains a materially distinct element is a question of law.....	514
iv)	when making the determination, look to the elements of the offense, including <i>chapeau</i> requirements.....	515
v)	where both crimes do not have a materially distinct element, convict under the more specific provision.....	515
vi)	cumulative conviction issue does not arise where crimes involve different conduct.....	516
vii)	cumulative convictions of themselves involve additional punishment	516
viii)	cumulative convictions important to sentencing, stigma, early release, describing the full culpability of the accused and providing a complete picture of the totality of the accused's conduct	517
ix)	application—cumulative convictions.....	517
(1)	cumulative convictions permissible under Articles 3 and 5	517
(a)	application to crimes under Articles 3 and 5.....	517
(2)	cumulative convictions permissible under Articles 2 and 5	518
(a)	application to crimes under Articles 2 and 5.....	518
(3)	cumulative convictions under Articles 2 and 3	518
(a)	application—willful killing under Article 2 and murder under Article 3 impermissible.....	518
(b)	application—inhuman treatment under Article 2 and cruel treatment under Article 3 impermissible.....	519
(c)	cumulative convictions under Articles 3 and 5 impermissible where would result in an impermissibly cumulative conviction between Articles 2 and 3.....	519
(4)	cumulative convictions under Articles 4 and 5	520
(a)	application—genocide under Article 4 and extermination under Article 5 permissible.....	520
(b)	application—genocide under Article 4 and persecution under Article 5 permissible	520
(5)	cumulative convictions within Article 3.....	521

	(a) application to crimes within Article 3	521
(6)	cumulative convictions within Article 4	521
	(a) application—may not convict for genocide and complicity in genocide for the same acts	521
(7)	cumulative convictions within Article 5	521
	(a) persecution and other crimes generally permissible	521
	(b) application to crimes within Article 5	523
(8)	concurrent convictions under Article 7(1) and Article 7(3)	524
	(a) not a question of cumulative convictions but concurrence between two modes of responsibility	524
	(b) inappropriate to convict under both Article 7(1) and Article 7(3) where based on same conduct; if both proven, convict under Article 7(1)	524
	(c) take into account that both types of responsibility were proven in sentencing	525
	(d) not necessary to make Article 7(3) findings where Article 7(1) responsibility proven beyond a reasonable doubt	526
	(e) where accused acquitted under Article 7(1) must consider Article 7(3) responsibility	526
	(f) permissible to convict under both Article 7(1) and Article 7(3) where based on different conduct	526
	(g) application—concurrent convictions under Article 7(1) and Article 7(3)	527
c)	Sentencing	527
	i) instruments governing sentencing	527
	ii) generally	529
	(1) overview of sentencing factors	529
	(a) sentencing factors are to be considered, but ultimate sentence is a matter for the discretion of the Trial Chamber	531
	(b) it is inappropriate to set down a definitive list of sentencing guidelines	531
	(2) goals of sentencing	532
	(a) generally	532
	(b) deterrence and retribution are main purposes of sentencing; rehabilitation, while relevant, should not be given undue weight	534
	(c) retribution	535
	(d) deterrence	537
	(i) deterrence is both individual (also called “specific”) and general	537
	(ii) individual deterrence	537
	(iii) application—individual deterrence	538
	(iv) general deterrence	538
	(v) deterrence relevant to commanders	539
	(vi) deterrence must not be accorded undue prominence	539
	(e) rehabilitation	540

	(i)	rehabilitation will not be given undue prominence	541
	(f)	guilty plea, <i>inter alia</i> , seen as rehabilitation, furthers truth, contributes to reconciliation and avoids revisionism.....	541
	(g)	equality before the law.....	541
	(h)	restoring and maintaining peace.....	542
	(i)	reinforcing that the laws must be obeyed by everyone and that the international legal system is implemented and enforced.....	542
	(j)	ending impunity.....	543
iii)	gravity		544
	(1)	sentence to reflect gravity of the crime	544
	(a)	gravity is “the litmus test” and the primary concern in imposing the sentence	545
	(b)	determination of gravity requires consideration of the particular circumstances of the case, as well as the form and degree of the accused’s participation	545
	(2)	gravity of particular crimes.....	547
	(a)	gravity of genocide.....	547
	(b)	gravity of crimes against humanity.....	548
	(i)	gravity of persecution as a crime against humanity.....	548
	(ii)	application—gravity of persecution as a crime against humanity.....	549
	(iii)	gravity of murder as a crime against humanity: intent to kill more serious than intent to cause serious bodily harm.....	550
	(c)	no distinction between the gravity of a crime against humanity and a war crime.....	550
	(d)	gravity of war crimes.....	551
	(e)	whether there is a rule that crimes resulting in loss of life should be punished more severely than those not leading to loss of life	552
	(f)	gravity of offenses committed under Article 7(1)	552
	(i)	gravity of participant in a joint criminal enterprise compared to principal offender.....	552
	(ii)	aiding and abetting warrants lower sentence than co-perpetration of a joint criminal enterprise.....	553
	(g)	gravity of offenses committed under Article 7(3)	553
	(h)	whether categorizing the seriousness of crimes is helpful	554
(3)	factors for assessing gravity of offenses		554
	(a)	generally	554
	(b)	same fact should not be evaluated both regarding gravity and as an aggravating factor—double-counting is impermissible	555
	(i)	application—double-counting	555
	(c)	overlap in criteria for evaluating gravity and aggravating factors/ whether they may be evaluated simultaneously.....	557

(d)	the scale of the crimes and number of victims	558
(i)	application—the scale of the crimes and number of victims	558
(ii)	multiple murders	560
(a)	application—multiple murders	560
(e)	vulnerability of the victims	561
(f)	youth of the victims	561
(i)	application—youth of the victims	561
(g)	suffering of victims	561
(i)	application—suffering of victims	562
(h)	impact on victims' relatives and friends	563
(i)	application—impact on victims' relatives and friends	564
(i)	the role of the accused (form of participation)	564
(i)	application—the role of the accused (form of participation)	565
(a)	coordinating the persecutory campaign in Prijeedor, including establishing, with others, the Omarska, Keraterm and Trnopolje camps	565
(b)	prison camp guard not in command position	565
(c)	acting under orders	566
(d)	not being one of the major perpetrators	566
(e)	accused only responsible for own role	567
(j)	the sentence should reflect the relative significance of the role of the accused in the context of the conflict in the former Yugoslavia, although not decisive	567
(i)	application—the role of the accused in the context of the conflict in the former Yugoslavia	568
(k)	personal participation of the accused	568
(i)	application—personal participation of the accused	569
(ii)	whether limited participation is a mitigating factor or diminishes gravity	570
(l)	form of participation of the accused/ brutality of crime	571
(i)	application—form of participation of the accused/ brutality of crime	571
(m)	sexual assault, humiliation and degradation	571
(i)	application—sexual assault, humiliation and degradation	572
(n)	willingness and enthusiasm of participation	572
(i)	application—willingness and enthusiasm of participation	572
iv)	aggravating and mitigating factors	573
(1)	generally	573
(a)	Trial Chamber obligated to take aggravating and mitigating factors into account	573
(b)	aggravating and mitigating factors not exhaustively defined	574

(c)	Trial Chamber determines which factors to count	574
(d)	Trial Chamber determines weight to give factors	575
(e)	burden of proof.....	575
	(i) aggravating factors	575
	(ii) mitigating factors.....	576
	(iii) sample application—burden of proof: mitigating factors.....	577
(2)	aggravating factors	577
	(a) aggravating factor may not be an element of the crime	577
	(i) application—overlap of aggravating factor and element of crime.....	578
	(a) position of authority.....	578
	(b) civilian status of the population/ victims, or vulnerability of the victims.....	578
	(c) ethnic and religious discrimination/ discriminatory intent	579
	(d) scale and scope of the crimes	580
	(e) exacerbated humiliation.....	580
	(b) same fact should not be evaluated both regarding gravity and as an aggravating factor—double-counting is impermissible	581
	(c) aggravating circumstances must be directly related to the offense charged.....	581
	(i) application—aggravating circumstances must be directly related to the offense charged.....	582
	(d) list of some aggravating factors.....	582
	(e) scale and scope of the crimes/ number of victims	582
	(i) application—scale and scope of the crimes/ number of victims.....	583
	(f) position of the accused/ abuse of position of authority	584
	(i) whether the “white gloves” perpetrator deserves a higher penalty than one who physically committed the crime.....	587
	(ii) application—position of the accused/ abuse of position of authority	587
	(g) professional background of the accused.....	592
	(i) application—professional background of the accused.....	592
	(h) active, direct or personal participation, particularly of commander.....	594
	(i) application—active, direct or personal participation, particularly of commander	595
	(i) role as fellow perpetrator	595
	(j) discriminatory state of mind/ ethnic and religious discrimination.....	596
	(i) application—discriminatory state of mind/ ethnic and religious discrimination.....	597
	(k) verbal abuse of victims	597
	(i) application—verbal abuse of victims	597
	(l) premeditation	598

	(i) application—premeditation.....	598
(m)	informed, voluntary, willing, enthusiastic or zealous participation in crime.....	598
	(i) application—informed, voluntary, willing, enthusiastic or zealous participation in crime.....	599
(n)	egregious nature of how crime was committed/ cruelty and depravity.....	599
	(i) application—egregious nature of how crime was committed/ cruelty and depravity.....	600
(o)	sexual, violent and humiliating nature of the acts.....	601
	(i) application—sexual, violent and humiliating nature of the acts.....	601
(p)	vulnerability of victims.....	602
	(i) application—vulnerability of the victims.....	602
(q)	civilian status of the victims.....	604
	(i) application—civilian status of the victims.....	604
(r)	extraordinary suffering of victims.....	604
	(i) application—extraordinary suffering of victims at Koricanske Strijene execution site.....	604
(s)	victim impact/ long-term effect of crimes on surviving victims.....	605
	(i) application—victim impact/ long-term effect of crimes on surviving victims.....	605
(t)	unwillingness to assist individuals who sought assistance.....	606
(u)	impact on victims' families.....	606
(v)	victims known to the accused.....	606
(w)	proving responsibility under both Article 7(1) and Article 7(3).....	607
(x)	youthful age of victims.....	607
	(i) application—youthful age of victims.....	607
(y)	extended time-period during which offenses were committed.....	607
	(i) application—extended time-period during which offenses were committed.....	607
(z)	character of the accused.....	608
(aa)	accused not testifying is not an aggravating factor.....	608
(bb)	the absence of a mitigating factor can never serve as an aggravating factor.....	608
	(i) application—the absence of a mitigating factor can never serve as an aggravating factor.....	609
(3)	mitigating factors.....	609
	(a) generally.....	609
	(i) mitigating circumstances include those not directly related to the offense.....	609
	(ii) mitigating circumstances do not detract from the gravity of the crime nor diminish responsibility.....	609
	(iii) list of some mitigating circumstances.....	610
(b)	cooperation of the accused.....	611
	(i) substantial cooperation to be considered.....	611

(ii)	determining whether cooperation is substantial.....	612
(a)	determination to be made by Trial Chamber.....	612
(b)	evaluation of cooperation depends on quantity <i>and</i> quality of information provided.....	612
(c)	Trial Chamber may rely on Prosecution's assessment of cooperation	613
(d)	lack of candor may impact on evaluation of cooperation.....	613
(e)	that accused gains something does not preclude finding of substantial cooperation	614
(iii)	cooperation that is less than substantial may be accorded modest weight.....	614
(iv)	error to consider cooperation by defense counsel	614
(v)	post-sentencing cooperation	615
(vi)	application—substantial cooperation.....	616
(vii)	application—moderate cooperation.....	620
(c)	guilty plea.....	621
(i)	a guilty plea is a mitigating factor.....	621
(ii)	a guilty plea is an acknowledgement of responsibility	621
(iii)	various benefits of a guilty plea.....	622
(iv)	a guilty plea encourages others to come forth	622
(v)	victims and witnesses are relieved from testifying at trial	623
(vi)	a guilty plea may provide a sense of relief to surviving victims and their relatives and friends	623
(vii)	a guilty plea may contribute to establishing the truth and reconciliation in the affected communities.....	623
(viii)	a guilty plea saves resources	624
(ix)	avoidance of a lengthy trial/saving resources should not be given undue weight.....	625
(x)	guilty plea does not realize certain aims of having a public trial, does not give the victims or survivors an opportunity to have their voices heard, and may create a gap in the historical record.....	626
(xi)	pleading guilty “early”	627
(xii)	“lateness” of guilty plea.....	628
(xiii)	pleas in other countries	628
(xiv)	application—guilty pleas	629
(xv)	application—fighting revisionism.....	632
(d)	remorse	633
(i)	application—remorse	634
(c)	duress/ superior orders	639
(i)	application—duress/superior orders	640

(f)	indirect participation/ participation relative to other members of a joint criminal enterprise	642
	(i) application—indirect participation.....	642
(g)	diminished mental responsibility.....	644
(h)	voluntary surrender.....	644
	(i) application—voluntary surrender.....	644
	(ii) voluntary surrender where person already incarcerated	646
	(iii) lack of opportunity to voluntarily surrender.....	646
(i)	subsequent conduct, including attempts to further peace	647
	(i) application—subsequent conduct, including attempts to further peace	648
	(ii) application—significant weight need not be given to attempts to further peace.....	649
(j)	steps taken toward rehabilitation/ reconciliation.....	650
	(i) application—steps taken toward rehabilitation/ reconciliation.....	650
(k)	comportment while in detention.....	651
	(i) application—comportment while in detention	652
(l)	advanced age	653
	(i) application—advanced age.....	654
(m)	young age	655
	(i) application—young age.....	655
(n)	other personal circumstances/family concerns	656
	(i) application—other personal circumstances/family concerns.....	657
(o)	poor health	660
	(i) application—poor health	660
(p)	assistance to detainees or victims.....	661
	(i) application—assistance to detainees or victims	661
	(ii) application—selective/occasional assistance given little, if any, weight.....	663
(q)	lack of prior criminal conviction.....	665
	(i) application—lack of prior criminal conviction.....	665
(r)	double jeopardy	666
	(i) application—double jeopardy	666
(s)	short period of time during which crimes occurred	666
	(i) application—short period of time during which crimes occurred	666
(t)	medical condition and intoxication	667
	(i) medical condition.....	667
	(ii) voluntary intoxication not a mitigating factor	667
	(iii) “involuntary” intoxication	667
(u)	character of the accused—generally not a factor to be taken into consideration unless exceptional circumstances	668
	(i) application—character of the accused.....	669
(v)	serving sentence in foreign country relevant regarding length and location of imprisonment but not a mitigating circumstance.....	672

	(i)	application—serving sentence in foreign country	672
(w)		general lack of prejudice	672
	(i)	application—general lack of prejudice	672
(x)		protected witness status/ family under witness protection	673
	(i)	application—protected witness status/ family under witness protection	673
(y)		length of proceedings/ time lapse between commission of crimes and sentencing	674
	(i)	application—length of proceedings/ time lapse between commission of crimes and sentencing	674
(z)		lack of strength of character not a mitigating factor	675
	(i)	application—lack of strength of character	675
(aa)		role of war propaganda/ deteriorating political and military situation—not mitigating factors	675
	(i)	application—role of war propaganda/deteriorating political and military situation	675
	(bb)	alleged brutality of arrest not a mitigating factor	676
	(cc)	not being the sole perpetrator not a mitigating factor	676
	(dd)	anguish experienced during armed conflict not a mitigating factor	676
	(ee)	deterrence not a mitigating factor	677
v)		taking account of sentencing practices in the former Yugoslavia	677
	(1)	Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia	677
	(2)	general practice regarding prison sentences in the courts of the former Yugoslavia is not binding	677
	(3)	reasons for departure from the sentencing practices in the former Yugoslavia must be explained	680
	(4)	Trial Chambers may impose a greater or lesser sentence than would be applicable under relevant law of the former Yugoslavia	680
	(5)	domestic sentencing practices in countries other than the former Yugoslavia	681
	(6)	substance of domestic sentencing law in the former Yugoslavia	681
	(7)	applicability of the principle of <i>lex mitior</i> (if the law relevant to the offense has been amended, the less severe law should apply)	682
	(a)	<i>lex mitior</i> constitutes an internationally recognized standard	682
	(b)	<i>lex mitior</i> requires the more lenient law apply if the law has been amended	682
	(c)	the amended law must be binding	682
	(d)	<i>lex mitior</i> is inapplicable regarding the law of the ICTY and national courts	683
vi)		prior sentencing practices of the ICTR and ICTY	684

	(1)	prior sentencing practices of the ICTR and ICTY—may be of assistance, but offer limited guidance	684
	(2)	factors for why different sentences might be imposed for the same type of crime	685
	(3)	comparing sentences only appropriate where offenses are the same and committed in substantially similar circumstances	686
	(4)	no sentencing guidelines or ranges	687
	(5)	a sentence should not be capricious or excessive/ must not be out of reasonable proportion with other sentences passed in similar circumstances for the same offense	687
	(6)	application—comparing sentence with those in other ICTY and ICTR cases	688
	(a)	comparing various other cases	688
	(b)	comparing one other case	688
	(c)	comparing co-defendants	689
vii)		miscellaneous principles regarding sentencing	689
	(1)	sentence must be individualized/ reflect individual guilt	689
	(2)	no individual should be punished for criminal conduct of others	690
	(3)	proportionality to be taken into account in sentencing	690
	(a)	application—proportionality	691
	(4)	discretion to impose concurrent, consecutive, a mixture of concurrent and consecutive, or single sentence, but must reflect “totality” of the criminal conduct	691
	(a)	application—discretion to impose concurrent, consecutive, a mixture of concurrent and consecutive, or single sentence, but must reflect “totality” of the criminal conduct	693
	(5)	Trial Chamber has discretion to impose life imprisonment; death penalty not available	694
	(6)	must give credit for time in detention	695
	(a)	application—credit for time in detention	696
	(7)	Trial Chamber may recommend that a minimum sentence be served before any commutation or sentence reduction	696
	(8)	error to assume early release when calculating sentence	697
X)		MISCELLANEOUS	698
	a)	General considerations regarding legal interpretation	698
	i)	sources of law when interpreting substantive criminal norms in the Statute	698
	ii)	tribunal bound to apply treaty law	698
	(1)	appropriate to interpret conventions in conformity with the Vienna Convention on the Law of Treaties	698
	iii)	crimes covered by Articles 2 to 5 of the Statute reflect customary international law	699
	iv)	the principle <i>nullum crimen sine lege</i> requires that the Tribunal only convict where the offense was proscribed under customary international law when committed	699
	b)	Fair trial rights	700

i)	presumption of innocence.....	700
	(1) Prosecution bears the burden of proof to establish guilt beyond reasonable doubt.....	701
	(2) Accused's decision to testify does not alter the burden of proof.....	702
	(3) Accused's failure to dispute that crime occurred does not alter the burden of proof.....	702
	(4) Accused's reliance on the alibi defense does not alter the burden of proof.....	702
	(5) considering mitigating factors agreed to in plea agreement does not violate the burden of proof.....	702
ii)	right to remain silent/ right against self-incrimination.....	703
	(1) there is an absolute prohibition against consideration of silence in the determination of guilt or innocence.....	703
	(2) addressing sentencing as part of closing does not violate right against self-incrimination.....	703
iii)	right to a fair and public trial.....	705
iv)	right to be given adequate time and facilities for the preparation of the defense.....	704
	(1) "equality of arms" principle.....	704
v)	right to an appeal.....	705
vi)	right of an accused to a fair trial/denial of due process.....	705
	(1) Rule 68 disclosure obligations essential for fair trials.....	706
	(a) Rule 68 applies to any material known to the Prosecution that suggests the innocence or mitigates the guilt of the Accused, or evidence that may affect the credibility of Prosecution evidence.....	707
	(b) the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion.....	707
	(c) disclosure required even if there exists other information of a generally similar nature.....	707
	(d) evidence called <i>proprio moto</i> by a Trial Chamber does not relieve the Prosecution of its disclosure obligations.....	708
	(e) material of a public character.....	708
	(f) continuing obligation to monitor witness testimony and disclose material relevant to impeachment.....	708
	(g) duty of the Prosecution to disclose exculpatory material arising from related cases.....	709
	(h) obligation to disclose continues after the Trial Chamber judgment throughout proceedings before the Appeals Chamber.....	709
	(i) test to apply: whether the Prosecution violated its Rule 68 obligations, and whether material prejudice resulted.....	709
	(j) establishing that prejudice occurred.....	710
	(k) delays in disclosure may occur.....	710
	(l) difficulties encountered in tracing and gaining access to evidence in the territory of the former Yugoslavia: disclosure must be as soon as practicable.....	711

	(2) application—the right of an accused to a fair trial/denial of due process, including Rule 68 disclosure obligations	711
vii)	right to an independent and impartial tribunal/ fair and public hearing	712
	(1) two-pronged test for challenges to judicial impartiality	712
	(2) high threshold required to rebut the presumption of impartiality	712
	(3) qualifications that play an integral role in satisfying eligibility requirements do not, in the absence of the clearest contrary evidence, show bias or impartiality	713
	(4) application—disqualification	713
	(a) Judge Mumba's acting as a representative on the United Nations Commission on the Status of Women not grounds for disqualification	713
	(b) Judge Benito's membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture not grounds for disqualification	714
	(c) judges not disqualified from hearing two or more trials arising out of the same series of events	714
	(d) alleged unintentional bias against Serbs	715
viii)	the right to self-representation	715
	(1) there is a presumption of the right to self-representation	715
	(2) the right to self-representation is a qualified and not an absolute right	716
	(3) the right may be curtailed where defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of the trial	716
	(4) Trial Chamber did not abuse its discretion in assigning counsel (<i>Mikseric</i> case)	717
	(5) restrictions on the right to represent oneself must be limited to the minimum extent necessary	717
ix)	the right to be informed promptly and in detail of the nature and cause of the charge (indictment practice)	718
	(1) indictment must contain a concise statement of the facts and crime or crimes with which the accused is charged	719
	(2) alleged basis of responsibility should be unambiguous in indictment	719
	(3) indictment should state material facts underpinning the charges, but not the evidence	719
	(a) application—Prosecution not required to prove non-material fact	720
	(4) must plead with sufficient particularity the material aspects of the Prosecution case	721
	(5) whether an indictment is pled with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him	722
	(6) an insufficiently specific indictment may cause the Appeals Chamber to reverse a conviction	722

	(a) application—parts of convictions reversed where not pled in the indictment.....	722
(7)	distinction between material facts and evidence	723
	(a) whether or not a fact is considered material depends on the nature of the Prosecution's case.....	723
	(b) in determining whether fact is material, should insure finding does not prejudice the accused.....	724
(8)	characterization of the alleged criminal conduct and proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity required.....	725
(9)	less specificity acceptable where crimes committed on a massive scale	724
(10)	may plead in the alternative.....	726
(11)	indictment may contain schedules that form part of the indictment	726
(12)	pleading Article 7(1)	727
	(a) indictment should plead the particular form(s) of participation under Article 7(1)	727
	(b) indictment should not simply quote Article 7(1).....	727
	(c) when the Prosecution intends to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be in the indictment.....	728
	(d) more detail required where person alleged to have personally committed the criminal acts in question.....	729
	(e) to allege an accused participated in certain crimes without identifying specific acts committed by the accused does not meet the requirement of a concise statement of facts	730
	(f) pleading joint criminal enterprise.....	730
	(i) application—pleading joint criminal enterprise.....	732
(13)	pleading Article 7(3)	732
	(a) application—pleading Article 7(3).....	733
(14)	may only convict for crimes charged in the indictment unless vagueness or ambiguity cured	734
	(a) may be cured by timely, clear and consistent information from the Prosecution.....	734
	(b) issue of notice—whether pleading defect impaired the accused's ability to prepare his defense/ whether trial was rendered unfair.....	735
	(c) application—"curing the indictment"	736
	(d) application—defective indictment not cured.....	738
(15)	motion to amend an indictment before Trial Chamber.....	739
(16)	challenges to the form of the indictment not timely after trial.....	740
c)	General considerations regarding the evaluation of evidence	740
	i) Trial Chamber may admit any relevant evidence with probative value	740
	ii) mere admission of evidence has no bearing on its weight	740
	iii) inferences	740
	iv) preference for oral testimony.....	741
	v) hearsay evidence.....	741

vi)	expert testimony.....	741
vii)	circumstantial evidence	742
viii)	non-live testimony of witnesses.....	742
ix)	evaluating <i>in vivo</i> testimony of witnesses	743
	(1) evaluating testimony of former defendant who entered plea	744
	(2) inconsistencies between witness testimony and prior statement	744
	(3) evaluating the testimony of “victim witnesses”	746
x)	testimony of a single witness on a material fact does not require corroboration, but does require cautious scrutiny	746
xi)	agreed facts and documentary evidence from another case.....	748
xii)	visual identification evidence	748
xiii)	in-court identification.....	749
	(1) witness testimony could be relied upon even where failure of in-court identification.....	749
xiv)	identifications made using photo spreads	750
xv)	intercept-related evidence	750
xvi)	on-site visits	751
xvii)	authenticity of documents	751
d)	Precedent and appellate review	751
i)	precedential value of prior decisions	751
	(1) the Appeals Chamber should follow its previous decisions absent cogent reasons in the interests of justice	751
	(2) decisions of the Appeals Chamber are binding on Trial Chambers	752
	(3) decisions of Trial Chambers have no binding force on each other.....	752
ii)	appellate review.....	752
	(1) generally.....	752
	(a) standard for appeal: showing an error of law invalidating the decision or an error of fact that occasioned a miscarriage of justice.....	752
	(b) appeal is not a trial <i>de novo</i>	753
	(c) form of submissions: party must explain how error renders the Trial Chamber decision invalid.....	753
	(d) Appeals Chamber maintains discretion to determine which submissions warrant a reasoned written response.....	755
	(i) Appeals Chamber may dismiss arguments clearly without foundation without detailed reasoning	755
	(e) Appeals Chamber may affirm, reverse, or revise Trial Chamber decisions	756
	(2) overview of review standards.....	756
	(3) errors of fact	758
	(a) standard is one of reasonableness: whether no reasonable trier of fact could have reached the verdict of guilty beyond a reasonable doubt	758
	(b) the Appeals Chamber will only intervene where there has been a “miscarriage of justice”.....	759

(c)	The Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber.....	759
(d)	a “margin of deference” is due to the Trial Chamber, which has the primary task of hearing, assessing and weighing the evidence.....	760
(i)	application—“margin of deference”: where subtle line between knowledge of intent and sharing of intent, determination should be left to Trial Chamber.....	761
(e)	multiple reasonable interpretations of evidence are possible.....	761
(f)	review of Trial Chamber decisions regarding the admission of evidence.....	762
(g)	where conviction may be overturned based on error of fact.....	762
(4)	errors of fact where “fresh”/ additional evidence is proffered.....	763
(a)	generally.....	763
(i)	distinction between rebuttal and “fresh” evidence.....	763
(ii)	burden of proof.....	763
(b)	test for the admission of “fresh”/ additional evidence.....	764
(i)	if party seeking to introduced evidence could have identified and presented it in the case in chief, not permitted later; Trial Chamber has discretion whether to admit evidence based on probative value and fairness.....	764
(ii)	if “fresh” evidence not admitted, or admitted but not credible or irrelevant, uphold conviction.....	764
(iii)	if “fresh” evidence admitted on appeal and credible/relevant, determine whether no reasonable trier of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber and the additional evidence.....	765
(iv)	whether the Appeals Chamber should evaluate that it is convinced beyond reasonable doubt as to guilt in light of “fresh”/additional evidence.....	765
(v)	whether the Appeals Chamber should evaluate the totality of the record when evaluating additional evidence.....	768
(c)	grounds for Trial Chamber to exclude late evidence.....	769
(5)	errors of law.....	769
(a)	must be an error invalidating the decision.....	769
(b)	Appeals Chamber will correct errors of law and apply evidence contained in the trial record.....	770
(c)	Appeals Chamber may raise errors of law <i>proprio moto</i> particularly regarding issues of general importance for the Tribunal’s case-law or functioning/ in the interests of justice.....	771
(6)	reasoned opinion in writing required.....	772

(a)	no error where Trial Chamber does not cite to all evidence in its judgment/ Trial Chamber not required to articulate every step of reasoning.....	773
(b)	Trial Chamber required only to make findings of fact that are essential.....	774
(c)	findings of fact on undisputed facts or facts agreed upon by the parties need not be explicitly made	774
(d)	not possible to draw inferences about the quality of a judgment from its length.....	775
(e)	appellant claiming an error of law because of lack of a reasoned opinion must identify the specific issues, factual findings or arguments that the Trial Chamber omitted to address.....	775
(f)	failure to make specific factual findings regarding each element of the crimes was error.....	775
(g)	failure to make factual findings as to each incident contained in schedules to the indictment was error.....	776
(7)	issues not raised before Trial Chamber waived on appeal	777
(a)	application—issues not raised below waived.....	778
e)	Appellate Chamber review of sentencing judgments.....	778
i)	sentencing appeals are not a trial <i>de novo</i>	778
ii)	sentencing appeals limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice.....	788
iii)	Trial Chambers are vested with broad discretion in determining an appropriate sentence	779
iv)	the weight to accord aggravating and mitigating factors is in the discretion of the Trial Chamber	779
v)	the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error.....	780
vi)	a Trial Chamber's decision may be disturbed on appeal if the Trial Chamber abused its discretion by taking into account what it ought not to have or by failing to take into account what it ought to have.....	780
vii)	no “automatic credit” given for mitigating factors.....	780
viii)	an appellant challenging the weight given by a Trial Chamber to a particular mitigating factor bears the burden of demonstrating that the Trial Chamber abused its discretion.....	780
ix)	while a Trial Chamber is required to take mitigating factors into account, it has no obligation to discuss each mitigating factor	781
x)	whether new mitigating factors may be raised in the Appellant's reply brief.....	782
xi)	raising on appeal mitigating factors beyond those set forth in the notice of appeal.....	782
xii)	Appeals Chamber may not consider mitigating factors that were available but not raised before the Trial Chamber	782
xiii)	Trial Chamber may rely on mitigating factors agreed upon by the parties where a plea was entered	783
xiv)	Appeals Chamber may revise/impose new sentence without remanding to the Trial Chamber.....	784

xv)	<i>proprio moto</i> re-qualifications of conviction based on error of law may not be to the detriment of the accused.....	784
xvi)	application—Appellate Chamber review of sentencing judgments.....	785
	(1) weight given to poor health, good character, lack of prior criminal convictions, cooperation with the Tribunal, and contribution to reconciliation in the former Yugoslavia	785
	(2) weight given to, <i>inter alia</i> , peace efforts.....	785
	(3) weight given to gravity of conduct and command position as an aggravating factor	785
	(4) weight given to cooperation	786
	(5) weight given to personal circumstances	786
	(6) weight given to personal circumstances for purposes of provisional release not necessarily relevant to assessing mitigating circumstances.....	787
	(7) no error to consider post-conflict conduct as an expression of remorse	787
	(8) no error to consider testimony as relevant to cooperation and remorse, not good character	788
f)	Accepting guilty pleas.....	788
	i) generally.....	788
	ii) guilty pleas are provided for at other international criminal courts/ requirements of Rule 62 <i>bis</i> reflect national and international law.....	790
	iii) plea must be voluntary, informed, unequivocal, and supported by a sufficient factual basis	790
	(1) voluntary.....	790
	(a) application—voluntary	791
	(2) informed.....	791
	(a) rights waived by pleading guilty	791
	(3) unequivocal	792
	(4) determining whether there is a sufficient factual basis for the crime and the accused's participation in it	792
	(5) application—voluntary, informed, unequivocal and supported by a sufficient factual basis	793
iv)	Trial Chamber may inquire into the terms of the plea agreement	794
v)	Trial Chamber has discretion whether to accept guilty plea	794
vi)	factors for Trial Chamber to consider in determining whether to accept guilty plea.....	794
	(1) application—factors for Trial Chamber to consider in determining whether to accept guilty plea	795
vii)	parties may recommend sentence, but Trial Chamber not bound.....	796
	(1) Trial Chamber shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially, give reasons for the departure.....	797
	(2) application—giving due consideration to the recommendation of the parties.....	797
viii)	plea agreement may include agreement to testify in other cases	798
ix)	plea agreement may include agreement not to appeal unless the Trial Chamber's sentence is above the range recommended by the Prosecutor.....	798

x)	plea agreement may include agreement to amend the indictment to withdraw charges or drop factual allegations	799
xi)	Trial Chambers generally grant leave to withdraw charges where part of plea agreement, but remaining charges should reflect the totality of the accused's criminal conduct	799
	(a) the role of the Prosecutor—whether there is a duty to present all evidence available.....	799
xii)	Trial Chamber generally limited to facts stipulated in indictment and pursuant to plea agreement.....	800
	(1) where Trial Chamber may consider evidence beyond the “plea agreement package”	801
	(2) where issue of Trial Chamber considering evidence beyond plea agreement not raised, it was waived.....	802
xiii)	where discrepancies between indictment and factual basis, indictment controls.....	802
xiv)	concerns regarding plea agreements in cases involving serious violations of international humanitarian law	802
xv)	no precedent for an “open plea”	804

SUMMARY OF JUDGMENTS AGAINST THE ACCUSED

Zlatko Aleksovski was commander of the prison facility at Kaonik, near Busovaca, in Bosnia and Herzegovina. He was convicted of violations of the laws or customs of war, namely outrages upon personal dignity, on the basis of his individual and superior responsibility. The Appeals Chamber overturned the Trial Chamber's finding that the accused was not responsible for the mistreatment of prisoners outside the prison compound and found that Aleksovski was also responsible for the mistreatment by the Croatian Defence Council (HVO) outside the prison and declared him guilty of aiding and abetting this mistreatment. The Appeals Chamber increased his sentence to seven years imprisonment.

Milan Babic was former Prime Minister/President of the government of the self-declared Serbian Autonomous District of Krajina, later the so-called Republic of Serbian Krajina. He pled guilty to persecution on political, racial, and religious grounds, a crime against humanity, as a co-perpetrator of a joint criminal enterprise to permanently and forcibly remove the majority of the Croat and other non-Serb population from approximately one-third of the territory of Croatia, in order to transform that territory into a new Serb-dominated state. The Trial Chamber sentenced him to thirteen years imprisonment. The Appeals Chamber affirmed the sentence.

Haradin Bala was a Kosovo Liberation Army (KLA) soldier and prison guard at the Llapushnik/Lapusnik prison camp or compound. He was convicted of individual responsibility for torture, cruel treatment and murder, all violations of the laws or customs of war. Specifically, he was found to have mistreated detainees, maintained and enforced inhumane conditions of detention, and aided and abetted one incident of torture at the Llapushnik/Lapusnik prison camp or compound in central Kosovo; he also participated in the murder of nine detainees in the Berishe/Berisa Mountains. He was sentenced to thirteen years imprisonment. (He was tried jointly with Fatmir Limaj and Isak Musliu.)

Predrag Banovic was a guard at the Keraterm camp in Prijedor. He pled guilty to one count of persecution as a crime against humanity, including five murders and the beating of twenty-five prisoners incarcerated at the Keraterm camp. He was sentenced to eight years in prison.

Vidoje Blagojevic was, among other positions, Commander of the Bratunac Brigade, a unit of the Army of the Republika Srpska. He was convicted of aiding and abetting the following: complicity to commit genocide (killing members of the group and causing serious bodily or mental harm to members of the group); violations of the laws or customs of war (murder); and crimes against humanity (murder, persecution and other

inhumane acts – specifically, forcible transfer), all in relation to the Srebrenica massacre. He was sentenced to eighteen years in prison. (He was tried jointly with Dragan Jokic.)

Tihomir Blaskic was commander of the HVO (Croatian Defence Council) armed forces headquarters in central Bosnia. He was convicted for atrocities committed against Bosnian Muslims between May 1992 and January 1994, in Bosnia and Herzegovina, particularly in the Lasva Valley region. In his capacity as commander of Bosnian Croat forces, Blaskic was convicted for individual and command responsibility regarding six counts of grave breaches of the 1949 Geneva Conventions under Article 2 of the ICTY Statute,¹ eleven counts of violations of the laws or customs of war (of which the Prosecution withdrew one), and three counts of crimes against humanity. The crimes included, *inter alia*, persecution, unlawful attacks upon civilians and civilian objects, taking civilians as hostages, willful killing, willfully causing great suffering or serious bodily injury, murder, inhuman treatment, cruel treatment, as well as destruction, and plunder of property. Blaskic was sentenced to forty-five years imprisonment. The Appeals Chamber overturned most convictions, finding Blaskic guilty under three counts—inhuman treatment as a grave breach of the Geneva Conventions, based on command responsibility regarding the operation of two detention facilities, individual responsibility for ordering the use of protected persons for the construction of defensive military installations, and individual responsibility regarding the use of human shields. The Appeals Chamber sentenced Blaskic to nine years imprisonment.

Miroslav Bralo was a member of the “Jokers,” the so-called anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council (HVO). He pled guilty to persecution as a crime against humanity, murder, torture, and outrages upon personal dignity including rape, as violations of the laws or customs of war; and torture, unlawful confinement and inhuman treatment, as grave breaches of the 1949 Geneva Conventions. His crimes related to the attack on the village of Ahmici in Central Bosnia-Herzegovina, located in the municipality of Vitez, which were designed to “ethnically cleanse” the village, and crimes related to the village of Nadioci, near Vitez in Bosnia and Herzegovina. The crimes included killing or assisting in the killing of

¹ “ICTY” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. “ICTY Statute” refers to the Updated Statute of the International Criminal Tribunal for the former Yugoslavia, Adopted MAY 25, 1993 by Resolution 827; as amended May 13, 1998 by Resolution 1166; as amended November 30, 2000 by Resolution 1329; as amended May 17, 2002 by Resolution 1411; as amended August 14, 2002 by Resolution 1431; as amended May 19, 2003 by Resolution 1481; as amended April 20, 2005 by Resolution 1597; as amended February 28, 2006 by Resolution 1660.

twenty-one civilians or detainees, including nine children. He was sentenced to twenty years imprisonment.

Radoslav Brđjanin held a number of political positions, including serving as First Vice-President of the Assembly of the Association of the Bosanska Krajina Municipalities, President of the Crisis Staff of the Autonomous Region of Krajina, and as a prominent member of the Serbian Democratic Party. He was convicted of persecution, torture, deportation and inhumane acts as crimes against humanity; willful killing and torture as grave breaches of the 1949 Geneva Conventions; and wanton destruction of cities, towns or villages or devastation not justified by military necessity, and destruction or willful damage done to institutions dedicated to religion as violations of the laws or customs of war. He was sentenced to thirty-two years in prison.

Mario Cerkez was founder of the Croatian Defence Council (HVO) and held various commands including: Assistant Commander of the Vitez Staff; Commander of the Vitez Brigade; Assistant Commander of the Stjepan Tomasevic Brigade (the unified Vitez and Novi Travnik Brigades); and ultimately Commander of the Viteska Brigade. He was convicted of individual responsibility for crimes against humanity (persecution), and individually responsible and for command responsibility for violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions, based on unlawful attack on civilians, unlawful attack on civilian objects, murder, willful killing, inhumane acts, inhuman treatment, imprisonment, unlawful confinement of civilians, taking civilians as hostages, wanton destruction not justified by military necessity, plunder of public or private property, and destruction or willful damage to institutions dedicated to religion or education. The Trial Chamber sentenced Cerkez to fifteen years imprisonment. On appeal, the Appeals Chamber overturned most of the convictions, but found Cerkez guilty of additional crimes. The Appelas Chamber imposed a sentence of six years imprisonment. (He was tried jointly with Dario Kordic.)

Ranko Cesic was a member of the Bosnian Serb Territorial Defence in Grcica, Brcko municipality, a member of the intervention platoon of the Bosnian-Serb Police Reserve Corps in Brcko, and a member of the Bosnian Serb Police Reserve unit at the Brcko police station. He pled guilty to six counts of crimes against humanity (five of which charged murder and one of which charged rape) and six counts of violations of the laws or customs of war (concerning the same events), five of which charged murder and one of which charged humiliating and degrading treatment. He was sentenced to eighteen years imprisonment.

Zejnil Delalic was co-ordinator of the Konjic Municipality Defense Forces, and co-ordinated the work of the defence forces of that municipality and the War Presidency. He was also Commander of Tactical Group 1 of the Armed Forces of Bosnia and Herzegovina, and commander of “all formations” of the armed forces in the area of

Dreznica-Jablanica-Prozor-Konjic-Pazarić-Hadžić-Igman. He was acquitted by the Trial Chamber of twelve counts of grave breaches of the 1949 Geneva Conventions and violations of the laws or customs of war. That decision was affirmed by the Appeals Chamber. (He was tried jointly with Zdravko Mucic, Hazim Delic and Esad Landzo.)

Hazim Delic was Deputy Commander of the prison camp near the town of Celebici in central Bosnia and Herzegovina. He was convicted of grave breaches of the 1949 Geneva Conventions. In his capacity as deputy at the Celebici camp he was responsible for killing, torturing, sexually assaulting, beating, and otherwise subjecting detainees to cruel and inhumane treatment. The victims were the Bosnian Serb detainees in the Celebici camp. The Appeals Chamber affirmed the sentence of eighteen years imprisonment. (He was tried jointly with Zdravko Mucic and Esad Landzo and Zejnil Delalic.)

Miroslav Deronjic held several positions in the Municipality of Bratunac in Eastern Bosnia, including serving as President of three crisis staffs. He was later appointed a Civilian Commissioner for Srebrenica municipality, and also vice-president of the SDS (Serbian Democratic Party of Bosnia and Herzegovina). He pled guilty to individual responsibility regarding one count of persecution as a crime against humanity. The persecution concerned Deronjic's ordering the attack on the village of Glogova on May 9, 1992, which resulted in sixty-four Muslim civilian deaths. The attack was part of a plan to permanently remove Bosnian Muslims from Glogova, Bratunac, Suha and Voljavica. Deronjic was sentenced to ten years in prison. The sentence was affirmed on appeal.

Damir Dosen was a guard shift leader at the Keraterm camp from June 3 to early August 1992. He pled guilty to persecution as a crime against humanity and was sentenced to five years imprisonment.

Drazen Erdemovic was a member of the 10th Sabotage Detachment of the Army of Republika Srpska (VRS), which killed hundreds of Bosnian Muslim civilian men from Srebrenica at the Pilica collective farm. He pled guilty to one count of violating the laws or customs of war and was sentenced to five years imprisonment.

Anto Furundzija was the local commander of a special unit of the military police of the Croatian Defence Council (HVO) known as the "Jokers." He was convicted of two counts of violating the laws or customs of war, as a co-perpetrator of torture and as an aider and abettor of outrages upon personal dignity, including rape. Furundzija was sentenced to ten years imprisonment for the former conviction and eight years imprisonment for the latter conviction, and ordered to serve them concurrently. The Appeals Chamber affirmed the convictions and sentences.

Stanislav Galic, was commander of the Sarajevo Romanija Corps of the Army of Republika Srpska, reporting directly to General Ratko Mladic. He was convicted of individual responsibility for violations of the laws or customs of war (acts of violence, the primary purpose of which is to spread terror among the civilian population), and crimes against humanity (murder and inhumane acts). The convictions related to a campaign of sniping and shelling of Sarajevo. Galic was sentenced to a single sentence of twenty years imprisonment.

Sefer Halilovic served as both Supreme Commander and, at the time relevant to the charges, Chief of Staff, of the Main Staff of the Army of the Republic of Bosnia and Herzegovina. He was found not guilty of command responsibility for murder as a violation of the laws or customs of war. The charges concerned the September 8-9, 1993 killing of Bosnian Croat civilians in the village of Grabovica in Bosnia-Herzegovina, and the September 14, 1993 killing of twenty-five Bosnian Croat civilians in the course of an attack against Uzdol, near Prozor, in Southern Herzegovina. He was ordered immediately released.

Goran Jelusic pled guilty to fifteen counts of crimes against humanity and sixteen counts of violations of the laws or customs of war relating to murders, beatings, and the plunder of private property in the municipality of Brcko in the north-eastern part of Bosnia and Herzegovina in May 1992. The Trial Chamber acquitted Jelusic of one count of genocide to which he had pled not guilty. The Appeals Chamber held that although the Trial Chamber's erroneous application of the standard under Rule 98 *bis* led to an incorrect assessment of the evidence on the count of genocide, it was not appropriate to reverse the acquittal and remit the case for further proceedings. As such, the Appeals Chamber affirmed the Trial Chamber's sentence of forty years imprisonment.

Dragan Jokic was Chief of Engineering of the Zvornik Brigade of the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska). He was convicted of aiding and abetting crimes against humanity (murder, extermination and persecution) and violations of the laws or customs of war (murder) in relation to the Srebrenica massacre. He was sentenced to nine years in prison. (He was tried jointly with Vidoje Blagojevic.)

Miodrag Jokic served in the Yugoslav Navy as commander of the Ninth Naval Sector (VPS) Boka, Montenegro. He pled guilty to individual and command responsibility for violations of the laws and customs of war: murder; cruel treatment; unlawful attack on civilians; devastation not justified by military necessity; unlawful attack on civilian objects; and destruction or willful damage to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science. His responsibility was based on aiding and abetting these crimes and commanding forces who shelled the Old Town of Dubrovnik on December 6, 1991. He was sentenced to

seven years imprisonment. The sentence was affirmed on appeal, although the conviction for command responsibility was vacated.

Drago Josipovic, an HVO soldier, was convicted by the Trial Chamber of persecution, murder, and inhumane acts as crimes against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to ten, fifteen, and ten years imprisonment respectively on those counts, to be served concurrently for fifteen years. The Appeals Chamber partially allowed his appeal and reduced his sentence to twelve years imprisonment.

Dragan Kolundzija was a guard shift leader at the Keraterm camp from early June to July 25, 1992. He pled guilty to persecution as a crime against humanity and was sentenced to three years imprisonment.

Dario Kordic was Vice President of the Presidency of the so-called Croatian Community of Herceg-Bosna; when that turned into the so-called Croatian Republic of Herceg-Bosna, Kordic continued to serve as Vice-President. He was convicted as individually responsible for crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions, based on persecutions, unlawful attack on civilians, unlawful attack on civilian objects, murder, willful killing, inhumane acts, inhuman treatment, imprisonment, unlawful confinement of civilians, wanton destruction not justified by military necessity, plunder of public or private property and destruction or willful damage to institutions dedicated to religion or education. He was sentenced to twenty-five years imprisonment. On appeal, his sentence of twenty-five years was affirmed, and an additional sentence of six years was imposed. (He was tried jointly with Mario Cerkez.)

Milojica Kos was a civilian mobilized to work as a reserve officer and assigned to serve as a guard shift leader at the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity, and murder and torture as violations of the laws or customs of war. The crimes were committed in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to six years imprisonment.

Radomir Kovac fought on the Republika Srpska side during the armed conflict in the Foca municipality of Bosnia and Herzegovina and was a member of a military unit formerly known as the “Dragan Nikolic unit.” He was convicted of enslavement and rape as crimes against humanity, and outrages upon personal dignity as violations of the laws or customs of war. Kovac’s criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped

repeatedly. Kovac was sentenced to a single sentence of twenty years imprisonment. The Appeals Chamber affirmed the decision of the Trial Chamber.

Milorad Krnojelac was the former warden of the Foca Kazneno-Popravni Dom (the KP Dom), a large prison complex situated in the town of Foca, in the eastern part of Bosnia and Herzegovina, where a large number of non-Serb men were detained for long periods of time. He was convicted of: individual and command responsibility for crimes against humanity (persecution based on imprisonment, living conditions and beatings); command responsibility for crimes against humanity (inhumane acts based on beatings); command responsibility for violations of the laws or customs of war (cruel treatment based on beatings); and individual responsibility for violations of the laws or customs of war (cruel treatment based on living conditions). The Appeals Chamber overturned the Trial Chamber's finding that Krnojelac was guilty as an aider and abettor of persecutions as a crime against humanity (imprisonment and inhumane acts) and cruel treatment as a violation of the laws or customs of war (living conditions imposed), and found that he was guilty as a co-perpetrator. Additionally, the Appeals Chamber held that the Trial Chamber erred in not holding Krnojelac guilty for command responsibility for torture and murder (as crimes against humanity and violations of the laws or customs of war), and persecution as a crime against humanity (beatings and forced labor). The Appeals Chamber held that he should also have been found guilty for individual responsibility for persecution as a crime against humanity (forced labor and forcible displacement). The Appeals Chamber imposed a new sentence to 15 years imprisonment.

Radislav Krstic was Chief of Staff of the Drina Corps of the Army of Republika Srpska (VRS) and then its Commander during the time of the Bosnian Serb take-over of the United Nations "safe haven" of Srebrenica in July 1995. As part of that take-over, Bosnian women, children and elderly were removed from the enclave and between 7,000-8,000 Bosnian Muslim men and boys were systematically murdered. The Trial Chamber convicted Krstic of genocide, violations of the laws or customs of war, and crimes against humanity, and sentenced to forty-six years imprisonment. On appeal, several of Krstic's convictions pertaining to the executions of the Bosnian Muslims in Srebrenica between July 13-19, 1995 were reduced to having aided and abetted the crimes—specifically, convictions for genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war. The Appeals Chamber upheld Krstic's convictions regarding murder as a violation of the laws or customs of war, and persecution as a crime against humanity regarding crimes committed in Potocari between July 10-13, 1995. His sentence was reduced to thirty-five years imprisonment.

Dragoljub Kunarac was leader of a reconnaissance unit which formed part of the local Foca Tactical Group. He was convicted of rape and torture as crimes against humanity and rape and torture as violations of the laws or customs of war. Kunarac's criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. Kunarac was sentenced to a single sentence of twenty-eight years imprisonment. The Appeals Chamber affirmed the decision of the Trial Chamber.

Mirjan Kupreskic, an HVO soldier, was convicted by the Trial Chamber for persecution as a crime against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to eight years imprisonment. The Appeals Chamber reversed the conviction on the grounds of a defective indictment and inadequate evidentiary basis for a conviction, and ordered his immediate release. (He was tried jointly with Vlatko Kupreskic and Zoran Kupreskic.)

Vlatko Kupreskic, a police operations officer, was convicted by the Trial Chamber for persecution as a crime against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to six years imprisonment. The Appeals Chamber reversed the conviction on evidentiary grounds, and ordered his immediate release. (He was tried jointly with Mirjan Kupreskic and Zoran Kupreskic.)

Zoran Kupreskic, an HVO soldier, was convicted by the Trial Chamber for persecution as a crime against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to ten years imprisonment. The Appeals Chamber reversed the conviction on the grounds of a defective indictment and inadequate evidentiary basis for a conviction, and ordered his immediate release. (He was tried jointly with Mirjan Kupreskic and Vlatko Kupreskic.)

Miroslav Kvocka was a former professional policeman attached to the Omarska Police Station and the functional equivalent of the deputy commander of the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder and torture as violations of the laws or customs of war in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to seven years imprisonment. On appeal, some of Kvocka's arguments regarding particular incidents were accepted, but none of the counts was overturned in its entirety. His sentence was affirmed.

Esad Landzo was a guard at the prison camp near the town of Celebici in central Bosnia and Herzegovina. He was convicted of grave breaches of the 1949 Geneva

Conventions. In his capacity as a guard at the Celebici camp he was responsible for killing, torturing, sexually assaulting, beating, and otherwise subjecting Bosnian Serb detainees in the Celebici camp to cruel and inhumane treatment. The Appeals Chamber affirmed the sentence of fifteen years imprisonment. (He was tried jointly with Zdravko Mucic, Hazim Delic and Zejnil Delalic.)

Fatmir Limaj was a member of the Kosovo Liberation Army (KLA) and alleged to hold a position of command and control within the KLA. He was charged with individual and command responsibility for violations of the laws or customs of war (cruel treatment, torture, and murder) and crimes against humanity (imprisonment, torture, inhumane acts, and murder). He was found not guilty of the crimes charged, and ordered immediately released. (He was tried jointly with Isak Musliu and Haradin Bala.)

Vinko Martinovic was a commander of the Vinko Skrobo ATG (anti-terrorist group) which was a sub-unit of the Convicts' Battalion (KB), a military group which was a component of the Croatian Defence Council (HVO). He was convicted of crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions. He was sentenced to a single sentence of eighteen years imprisonment. On appeal, while a few parts of his convictions were overturned, his sentence was affirmed. (He was tried jointly with Mladen Naletilic.)

Slobodan Milosevic was President of the Republic of Serbia and, subsequently, President of the Federal Republic of Yugoslavia. Milosevic was charged with perpetrating multiple crimes against humanity, grave breaches of the Geneva Conventions of 1949, and a series of violations of the laws or customs of war. The charges against him were originally contained in three separate indictments for Kosovo, Croatia, and Bosnia, but were consolidated for a single trial, which began on 12 February 2002. On March 11, 2006, Milosevic died while in custody. (Only the decision regarding the appointment of counsel is included in this digest.)

Darko Mrdja was a member of a special unit of the Prijedor Police known as the "Intervention Squad," which served under the Bosnian Serb authorities in Prijedor, in Bosnia and Herzegovina. He participated in the execution of an estimated 200 men at Koricanske Stijene. He pled guilty to murder as a violation of the laws or customs of war and inhumane acts as a crime against humanity and was sentenced to seventeen years imprisonment.

Zdravko Mucic was commander of the prison camp near the town of Celebici in central Bosnia and Herzegovina. He was convicted of grave breaches of the 1949 Geneva Conventions. In his capacity as commander at the Celebici camp, he was responsible for killing, torturing, sexually assaulting, beating, and otherwise subjecting

detainees to cruel and inhumane treatment. The victims were the Bosnian Serb detainees in the Celebici camp. The Appeals Chamber affirmed the sentence of nine years imprisonment. (He was tried jointly with Hazim Delic, Esad Landzo and Zejnil Delalic.)

Isak Musliu was a member of the Kosovo Liberation Army and alleged to be a commander and at times prison guard of the Llapushnik/Lapusnik prison camp or compound in central Kosovo. He was charged with individual and command responsibility for violations of the laws or customs of war (cruel treatment, torture, and murder) and crimes against humanity (imprisonment, torture, inhumane acts, and murder). He was found not guilty of the crimes charged, and ordered immediately released. (He was tried jointly with Fatmir Limaj and Haradin Bala.)

Mladen Naletilic was commander of a military group called the Convicts' Battalion (KB), which was a component of the Croatian Defence Council (HVO). He was convicted of crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions. He was sentenced to a single sentence of twenty years imprisonment. On appeal, while a few parts of his convictions were overturned, his sentence was affirmed. (He was tried jointly with Vinko Martinovic.)

Dragan Nikolic was the first person indicted by the ICTY on November 4, 1994. From early June 1992 until about September 30, 1992, he was commander of the Susica detention camp, near the town of Vlasenica in eastern Bosnia and Herzegovina. Between late May and October 1992, as many as 8,000 Muslims or other non-Serbs from Vlasenica and the surrounding villages were detained at the Susica camp. Nikolic pled guilty, and the Trial Chamber entered a single conviction for persecution as a crime against humanity, incorporating murder, rape and torture as crimes against humanity. The Trial Chamber sentenced him to twenty-three years imprisonment. Upon appeal, the sentence was reduced to twenty years imprisonment.

Momir Nikolic was Assistant Commander and Chief of Security and Intelligence of the Bratunac Brigade of the VRS (Army of the Republika Srpska). In July 1995, he was a Captain First Class in the VRS. Nikolic pled guilty to persecution, a crime against humanity. Following the fall of Srebrenica, Momir Nikolic organized and assisted in the forcible transfer of the population, as well as the separation and detention of the men prior to their execution. He also co-ordinated the exhumation and re-burial of Muslim bodies. He was sentenced to 27 years imprisonment. Upon appeal, the sentence was reduced to twenty years imprisonment.

Dragan Obrenovic was Chief of Staff and Deputy Commander of the Zvornik Brigade of the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska), and also acted as commander of the Brigade. The Brigade was responsible for

the municipality in which the vast majority of the executions following the fall of Srebrenica occurred. Members of the Zvornik Brigade participated in mass executions of Bosnian Muslim men and assisted in transporting the bodies of those executed to mass grave sites. Obrenovic pled guilty to one count of persecution as a crime against humanity. He was sentenced to seventeen years in prison.

Dragan Papic was acquitted by the Trial Chamber on the one count of persecution as a crime against humanity for which he was tried.

Biljana Plavsic was a member of the Presidency of Republika Srpska, and, after the conflict, was President of Republika Srpska. She pled guilty to persecution as a crime against humanity and was sentenced to eleven years imprisonment.

Dragoljub Prcac was a retired policeman and crime technician mobilized to serve in the Omarska Police Station and acted as an administrative aide to the commander of the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder and torture as violations of the laws or customs of war in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to five years imprisonment. The Appeals Chamber dismissed all of Prcac's grounds of appeal and affirmed his sentence.

Mladjo Radic was a professional policeman attached to the Omarska Police Station and a guard shift leader at the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder and torture as violations of the laws or customs of war in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to twenty years imprisonment. The Appeals Chamber dismissed all of Radic's grounds of appeal, and affirmed his sentence.

Vladimir Santic was a military police commander and commander of the "Jokers." He was convicted by the Trial Chamber of persecution, murder, and inhumane acts as crimes against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to twenty-five, fifteen, and ten years imprisonment for those crimes, respectively, to be served concurrently for twenty-five years. The Appeals Chamber partially allowed his appeal and reduced his sentence to eighteen years imprisonment.

Dusko Sikirica was commander of security at the Keraterm camp between June 14 and July 27, 1992. He pled guilty to persecution as a crime against humanity and was sentenced to fifteen years imprisonment.

Blagoje Simic, a medical doctor, was Vice-President of the Municipal Assembly, President of the “Crisis Staff,” later renamed the War Presidency, and President of the Serbian Democratic Party Municipal Board, of Bosanski Samac in the northeastern part of the then Republic of Bosnia and Herzegovina. Bosanski Samac was subject to a forcible takeover by Serb paramilitary and police on April 17, 1992. Simic was convicted of one count of persecution as a crime against humanity, based upon unlawful arrest and detention of Bosnian Muslim and Bosnian Croat civilians, cruel and inhumane treatment including beatings, torture, forced labor assignments, and confinement under inhumane conditions, and deportation and forcible transfer. He was sentenced to seventeen years imprisonment.

Milan Simic was President of the Executive Board of the Municipal Assembly of Bosanski Samac and a member of the Serb Crisis Staff for the city of Bosanski Samac. He pled guilty to two counts of torture as a crime against humanity and was sentenced to five years imprisonment.

Milomir Stakic, while serving as vice-president of the SDS (Serbian Democratic Party) Municipal Assembly in Prijedor, replaced the freely elected President of the Assembly in an illegal *coup d'état* in 1992 as part of a plan to create a purely Serbian municipality. Stakic simultaneously served as President of the self-proclaimed Assembly of the Serbian people of the Municipality of Prijedor, President of the Prijedor Municipal People's Defence Council, and civilian leader of the Prijedor Municipal Crisis Staff. Stakic together with his co-perpetrators established the Keraterm, Omarska, and Trnopolje prison camps, as well as other detention facilities, and took part in ordering attacks on Hambarine and Kozarac. Stakic was convicted of crimes against humanity (extermination and persecution) and murder as a violation of the laws or customs of war. The Trial Chamber sentenced him to life in prison. On appeal, his sentence was reduced to forty years imprisonment.

Pavle Strugar is a retired Lieutenant-General of the then Yugoslav Peoples' Army (JNA), and, at the relevant time, was commander of the Second Operational Group of the JNA. He was charged with crimes committed from December 6-31, 1991, in the course of a military campaign of the JNA in and around Dubrovnik Croatia in October, November and December of 1991, and particularly, pertaining to the December 6 attack on the Old Town of Dubrovnik. He was convicted of command responsibility for attacks on civilians, and destruction of and willful damage to cultural property, both violations of the laws or customs of war. He was sentenced to eight years imprisonment.

Dusko Tadic was the former President of the Local Board of the Serb Democratic Party (SDS) in Kozarac. He was convicted on seven counts of grave breaches of the

1949 Geneva Conventions, six counts of violations of the laws or customs of war, and seven counts of crimes against humanity. The crimes were committed in 1992 in the Prijedor District and more specifically at the Omarska, Keraterm, and Trnopolje camps, in Kozarac and in the area of Jaskici and Sivi. Tadic was sentenced to twenty years imprisonment.

Miroslav Tadic was a member and head of the Exchange Commission, and an *ex officio* member of the Crisis Staff, in Bosanski Samac, in the north eastern part of the then Republic of Bosnia and Herzegovina. He was also Assistant Commander for Logistics of the 4th Detachment of the Yugoslav Peoples' Army's 17th Tactical Group. He was responsible for organizing and carrying out deportations of non-Serb civilians from Bosanski Samac. He was convicted of one count of persecution, a crime against humanity, based upon deportation and forcible transfer. He was sentenced to eight years imprisonment. (He was tried jointly with Milan Simic and Simo Zaric.)

Stevan Todorovic, former Chief of Police in Bosanski Samac, pled guilty to persecution as a crime against humanity and was sentenced to ten years imprisonment.

Mitar Vasiljevic was a member of the Serb minority in Visegrad and acted as an informant for a paramilitary group known locally as the White Eagles, which operated with the police and various military units stationed in Visegrad. He was convicted of persecution as a crime against humanity and murder as a violation of the laws or customs of war based on the shooting of seven unarmed civilians, five of whom died. He was sentenced to a single sentence of twenty years imprisonment. The Appeals Chamber determined that Vasiljevic was responsible for aiding and abetting the crimes, but was not responsible as a co-perpetrator in a joint criminal enterprise. Accordingly, it reduced his sentence to 15 years imprisonment.

Zoran Vukovic was a member of the Bosnian Serb forces fighting against the Bosnian Muslim forces in the Foca municipality of Bosnia and Herzegovina, and a member of a military unit formerly known as the "Dragan Nikolic unit." He was convicted of rape and torture as both crimes against humanity and violations of the laws or customs of war. Vukovic's criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. Vukovic was sentenced to a single sentence of twelve years imprisonment. The Appeals Chamber affirmed the decision of the Trial Chamber.

Simo Zaric was Assistant Commander for Intelligence, Reconnaissance, Morale and Information of the 4th Detachment of the Yugoslav Peoples' Army's (JNA's) 17th

Tactical Group; Chief of National Security Service for Bosanski Samac; Deputy to the President of the War Council for Security Matters in Odzak; Assistant Commander for Morale and Information of 2nd Posavina Brigade. He was convicted of one count of persecution as a crime against humanity, based upon cruel and inhumane treatment including beatings, torture and confinement under inhumane conditions, committed in 1992 in Bosanski Samac in Bosnia and Herzegovina. He was sentenced to six years imprisonment. (He was tried jointly with Milan Simic and Miroslav Tadic.)

Zoran Zigic was a civilian mobilized to work as a reserve officer who worked for a short period of time in the Keraterm camp delivering supplies. He was allowed to enter the Omarska, Keraterm, and Trnopolje camps regularly as a civilian. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder, torture, and cruel treatment as violations of the laws or customs of war. The crimes occurred in the region of Prijedor, between May 26 and August 30, 1992. Zigic was sentenced to twenty-five years imprisonment. The Appeals Chamber overturned Zigic's conviction for the crimes committed in the Omarska camp, but noted that no conviction for crimes against individual victims under the relevant counts had been reversed. Because the Appeals Chamber concluded that the Trial Chamber gave only little weight to Zigic's convictions for crimes committed in the Omarska camp, because Zigic committed the highest number of crimes of all the accused, and because Zigic generally entered the camps, not as apart of an official function, but solely for the purpose of abusing detainees, the Appeals Chamber affirmed the sentence.

LISTING OF CASES INCLUDED

This compendium contains the ultimate Trial Chamber and Appeals Chamber judgments through December 31, 2005, including Sentencing Judgments:

Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Appeals Chamber), March 24, 2000.

Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Trial Chamber), June 25, 1999.

Prosecutor v. Babic, Case No. IT-03-72-A (Appeals Chamber), July 18, 2005.

Prosecutor v. Babic, Case No. IT-03-72-S (Trial Chamber), June 29, 2004.

Prosecutor v. Banovic, Case No. IT-02-66/1-S (Trial Chamber), October 28, 2003.

Prosecutor v. Blaskic, Case No. IT-95-14-A (Appeals Chamber), July 29, 2004.

Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000.

Prosecutor v. Bralo, Case No. IT-95-17-S (Trial Chamber), December 7, 2005.

Prosecutor v. Brdjanin, Case No. IT-99-36-T (Trial Chamber), September 1, 2004.

Prosecutor v. Cesic, Case No. IT-95-10/1-S (Trial Chamber), March 11, 2004.

Prosecutor v. Delalic, Mucic, Delic and Landzo, Case No. IT-96-21 (Appeals Chamber), February 20, 2001.

Prosecutor v. Delalic, Mucic, Delic and Landzo, Case No. IT-96-21 (Trial Chamber), November 16, 1998.

[Note: This case is routinely referred to as the “Celebici” case. Subsequent to the appeal of Delalic’s acquittal, the case was captioned *Prosecutor v. Mucic, Delic and Landzo*.]

Prosecutor v. Deronjic, Case No. IT-02-61-A (Appeals Chamber), July 20, 2005.

Prosecutor v. Deronjic, Case No. IT-02-61-S (Trial Chamber), March 30, 2004.

Prosecutor v. Erdemovic, Case No. IT-96-22 (Appeals Chamber), October 7, 1997.

Prosecutor v. Erdemovic, Case No. IT-96-22 (Trial Chamber), March 5, 1998.

Prosecutor v. Furundzija, Case No. IT-95-17/1 (Appeals Chamber), July 21, 2000.

Prosecutor v. Furundzija, Case No. IT-95-17/1 (Trial Chamber), December 10, 1998.

Prosecutor v. Galic, Case No. IT-98-29-T (Trial Chamber), December 5, 2003.

Prosecutor v. Halilović, Case No. IT-01-48-T (Trial Chamber), November 16, 2005.

Prosecutor v. Jelisić, Case No. IT-95-10 (Appeals Chamber), July 5, 2001.

Prosecutor v. Jelisić, Case No. IT-95-10 (Trial Chamber), December 14, 1999.

Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-A (Appeals Chamber), August 30, 2005.

Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-S (Trial Chamber), March 18, 2004.

[Note: Two defendants have the last name of Jokic; therefore first names are used.]

Prosecutor v. Dragan Jokic, Case No. IT-02-60-T (Trial Chamber), January 17, 2005.

Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001.

Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2 (Bureau Decision), May 4, 1998, & (Trial Chamber), May 21, 1998.

Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2-A, (Appeals Chamber), December 17, 2004.

Prosecutor v. Krnojelac, Case No. T-97-25-A (Appeals Chamber), September 17, 2003.

Prosecutor v. Krnojelac, Case No. IT-97-25 (Trial Chamber), March 15, 2002.

Prosecutor v. Krstić, Case No. IT-98-33-A (Appeals Chamber), April 19, 2004.

Prosecutor v. Krstić, Case No. IT-98-33 (Trial Chamber), August 2, 2001.

Prosecutor v. Kunarac, Kovac, and Vuković, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), June 12, 2002.

Prosecutor v. Kunarac, Kovac, and Vuković, Case No. IT-96-23 and IT-96-23/11 (Trial Chamber), February 22, 2001.

Prosecutor v. Kupreskić et al., Case No. IT-95-16-A (Appeals Chamber), October 23, 2001.

Prosecutor v. Kupreskić et al., Case No. IT-95-16 (Trial Chamber), January 14, 2000.

Prosecutor v. Krvočka, Radić, Zigić, and Prvać, Case No. IT-98-30/1-A (Appeals Chamber), February 28, 2005.

Prosecutor v. Krvočka, Radić, Zigić, and Prvać, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001.

Prosecutor v. Limaj, Bala and Musliu, Case No. IT-03-66-T (Trial Chamber), November 30, 2005.

Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision On Interlocutory Appeal Of The Trial Chamber's Decision On The Assignment Of Defense Counsel, November 1, 2004.

[Note: The case is listed as *Milosevic v. Prosecutor* because it is based on an interlocutory appeal by the defendant.]

Prosecutor v. Mrdja, Case No. IT-02-59-S (Trial Chamber), March 31, 2004.

Prosecutor v. Mucic, Delic and Landzo, Case No. IT-96-21 (Appeals Chamber), April 8, 2003.

[Note: This case is routinely referred to as the "Celebici" case. It was originally under the caption *Prosecutor v. Delalic, Mucic, Delic and Landzo*.]

Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34 (Trial Chamber), March 31, 2003.*

Prosecutor v. Momir Nikolic, Case No. IT-02-60/1-S (Trial Chamber), December 2, 2003.**

[Note: Two defendants have the last name of Nikolic; therefore first names are used.]

Prosecutor v. Dragan Nikolic, Case No. IT-94-2-A (Appeals Chamber), February 4, 2005.

Prosecutor v. Dragan Nikolic, Case No. IT-94-2-S (Trial Chamber), December 18, 2003.

Prosecutor v. Obrenovic, Case No. IT-02-60/2-S (Trial Chamber), December 10, 2003.

Prosecutor v. Plasic, Case No. IT-00-39&40/1 (Trial Chamber), February 27, 2003.

Prosecutor v. Rajic, Case No. IT-95-12 (Trial Chamber), Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, September 13, 1996.

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), November 13, 2001.

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), September 3, 2001.

Prosecutor v. Milan Simic, Case No. IT-95-9/2-S (Trial Chamber), October 17, 2002.

[Note: Two defendants have the last name of Simic; therefore first names are used.]

Prosecutor v. Blagoje Simic, Tadic and Zaric, Case No. IT-95-9 (Trial Chamber), October 17, 2003.

Prosecutor v. Stakic, Case No. IT-97-24-T (Trial Chamber), July 31, 2003.***

Prosecutor v. Strugar, Case No. IT-01-42-T, (Trial Chamber), January 31, 2005.

Prosecutor v. Tadić, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.

Prosecutor v. Tadić, Case No. IT-94-1 (Appeals Chamber), January 31, 2000.

Prosecutor v. Tadić, Case No. IT-94-1 (Appeals Chamber), January 26, 2000.

Prosecutor v. Tadić, Case No. IT-94-1 (Appeals Chamber), July 15, 1999.

Prosecutor v. Tadić, Case No. IT-94-1 (Trial Chamber), November 11, 1999.

Prosecutor v. Tadić, Case No. IT-94-1 (Trial Chamber), May 7, 1997.

Prosecutor v. Todorović, Case No. IT-95-9/1 (Trial Chamber), July 31, 2001.

Prosecutor v. Vasiljević, Case No. IT-98-32-A (Appeals Chamber), February 25, 2004.

Prosecutor v. Vasiljević, Case No. IT-98-32-T (Trial Chamber), November 29, 2002.

* AN APPEAL HAS SINCE BEEN RENDERED IN THE NALETILIC AND MARTINOVIC CASE, DATED MAY 3, 2006.

** AN APPEAL HAS SINCE BEEN RENDERED IN THE CASE OF MOMIR NIKOLIC, DATED MARCH 8, 2006.

*** AN APPEAL HAS SINCE BEEN RENDERED IN THE STAKIC CASE, DATED MARCH 22, 2006.

1) WAR CRIMES: GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949 (ARTICLE 2)

a) Statute

ICTY Statute, Article 2:

“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.”

b) General elements for Article 2 crimes

Prosecutor v. Blaskić, Case No. IT-95-14-A (Appeals Chamber), July 29, 2004, para. 170: “The Appeals Chamber considers that the jurisdictional prerequisites for the application of Article 2 of the Statute have been exhaustively considered in the jurisprudence of the International Tribunal and only the relevant aspects will be restated here. In order for the International Tribunal to prosecute an individual for grave breaches of the Geneva Conventions under Article 2 of the Statute, the offence must be committed, *inter alia*: (i) in the context of an international armed conflict; and (ii) against persons or property defined as ‘protected’ under the Geneva Conventions.” *See also Prosecutor v. Tadić*, Case No. IT-94-1 (Appeals Chamber), July 15, 1999, para. 80 (similar).

Prosecutor v. Brđjanin, Case No. IT-99-36-T (Trial Chamber), September 1, 2004, para. 121: “There are four preconditions to the applicability of Article 2 of the Statute: (i) the existence of an armed conflict; (ii) the establishment of a nexus between the alleged crimes and the armed conflict; (iii) the armed conflict must be international in nature; and (iv) the victims of the alleged crimes must qualify as protected persons pursuant to the provisions of the 1949 Geneva Conventions.” *See also Prosecutor v. Naletilić and*

Martinović, Case No. IT-98-34 (Trial Chamber), March 31, 2003, para. 176 (same requirements).

Prosecutor v. Simić, Tadić, and Zarić, Case No. IT-95-9 (Trial Chamber), October 17, 2003, paras. 105-106: “A precondition to the applicability of Article 2 is the existence of an armed conflict in the territory where the crimes are alleged to have occurred. . . . A further precondition to the applicability of Article 2 is the existence of a nexus between the crimes alleged and the armed conflict, i.e. of a sufficient link between them. . . .” “The jurisprudence of the Tribunal has established two further requirements for the application of Article 2 of the Statute: (i) it must be demonstrated that the crimes occurred in the context of an international armed conflict; (ii) the victims of the crimes must qualify as ‘protected persons’ under the applicable provision of the Geneva Conventions.”

i) the existence of an armed conflict (element 1)

(1) armed conflict required

Blaskić, (Appeals Chamber), July 29, 2004, para. 170: “In order for the International Tribunal to prosecute an individual for grave breaches of the Geneva Conventions under Article 2 of the Statute, the offence must be committed, *inter alia*: (i) in the context of an . . . armed conflict. . . .”

Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001, para. 22: “Articles 2 and 3 of the Statute set forth provisions which reflect the laws of war; plainly a pre-condition to the applicability of these Articles is the existence of an armed conflict in the territory where the crimes are alleged to have occurred.”

See also Brđjanin, (Trial Chamber), September 1, 2004, para. 121 (requiring armed conflict); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 105 (same); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 176 (same).

(2) armed conflict defined

Prosecutor v. Kunarac, Kovac, and Voković, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), June 12, 2002, para. 56: “An ‘armed conflict’ is said to exist ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’” *See also Prosecutor v. Tadić*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70 (same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 122: “It is settled in the jurisprudence of this Tribunal that an armed conflict exists ‘whenever there is resort to armed forces between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’” *See also Stakić*, (Trial Chambers), July 31, 2003, para. 568 (same).

(3) duration of application of international humanitarian law

Tadić, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70: “International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.”

ii) there must be a nexus between the conflict and crimes alleged (element 2)

Brđjanin, (Trial Chamber), September 1, 2004, para. 121: One of the preconditions to the applicability of Article 2 of the Statute is “the establishment of a nexus between the alleged crimes and the armed conflict. . . .”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 32: “[I]n order for a particular crime to qualify as a violation of international humanitarian law under Articles 2 and 3 of the Statute, the Prosecution must also establish a sufficient link between that crime and the armed conflict.”

Prosecutor v. Blaskić, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 69: “[I]t is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole.”

(1) not necessary that actual combat occurred in the area where the crimes occurred

Brđjanin, (Trial Chamber), September 1, 2004, para. 123: “In linking the offences to the armed conflict, it is not necessary to establish that actual combat activities occurred in the area where the crimes are alleged to have occurred.” *See also Tadić*, (Appeals Chamber), October 2, 1995, para. 70 (invoking same test); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 105 (invoking same test).

Blaskić, (Trial Chamber), March 3, 2000, para. 69: “This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment.”

(2) it is sufficient that the crimes were closely related to the hostilities

Brđjanin, (Trial Chamber), September 1, 2004, para. 123: “[I]t is sufficient that the alleged crimes were *closely related* to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.” (emphasis in original) *See also Tadić*, (Appeals Chamber), October 2, 1995, para. 70 (invoking same test); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 105 (invoking same test); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 32 (invoking same test); *Blaskić*, (Trial Chamber), March 3, 2000, para. 69 (invoking same test).

iii) the armed conflict must be international (element 3)

(1) international armed conflict required

Blaskić, (Appeals Chamber), July 29, 2004, para. 170: “[T]he offence must be committed, *inter alia* . . . in the context of an international armed conflict . . .” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 121 (requiring international armed conflict); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 106 (same); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 176 (same);

(2) international armed conflict defined

Tadić, (Appeals Chamber), July 15, 1999, para. 84: “It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.” *See also Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 66 (quoting same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 124: “Clearly, an armed conflict is international in nature if it takes place between two or more States. In addition, an internal armed conflict may become international if (i) another State intervenes in that conflict through its troops, or, alternatively, (ii) some of the participants in the internal armed conflict act on behalf of that other State.”

(3) where state has not intervened in another state directly through its own troops, “overall control test” applies to determine whether sufficient control over military forces exists

Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2-A (Appeals Chamber), December 17, 2004, paras. 299, 307, 313: “When determining the international character of the armed conflict, the Trial Chamber applied the *overall control* test set out in the *Tadić* Appeal Judgement, according to which an armed conflict becomes international when a foreign state exercises overall control over the military forces of one of the belligerents.” “The Appeals Chamber confirmed this reasoning in *Aleksovski* and reiterated that the *effective control* test, as set out by the ICJ [International Court of Justice] in the *Nicaragua* Case, is not persuasive. The Appeals Chamber does not see any reason to depart from this settled jurisprudence.” “[T]he Trial Chamber did not err in law when it applied the *overall control* test for the determination of the international character of the armed conflict in Central Bosnia.” (emphasis in original) *See also Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 309-312.

Prosecutor v. Delalić, et al., Case No. IT-96-21 (Appeals Chamber), February 20, 2001, para. 26: “The ‘overall control’ test set forth in the *Tadić* Appeal Judgement is . . . the applicable criteria for determining the existence of an international armed conflict.”

Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Appeals Chamber), March 24, 2000, paras. 134, 145: “[T]he Appeals Chamber will follow its decision in the *Tadić* Judgement, since, after careful analysis, it is unable to find any cogent reason to depart from it,” and the “‘overall control’ test, set out in the *Tadić* Judgement is the applicable law.” “The ‘overall control’ test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control.”

Tadić, (Appeals Chamber), July 15, 1999, para. 146: “The Appeals Chamber has concluded that in general international law, [different] tests may be applied for determining whether an individual is acting as a *de facto* State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 124: “There are three different tests, specific to the circumstances, to determine the degree of control that a foreign State has over armed forces fighting on its behalf. For armed forces, militias or paramilitary units acting as *de facto* organs of the State, the establishment of the overall character of the control suffices.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 111: *Tadić* “established that an armed conflict, which is otherwise internal, is internationalised if a foreign state exercises ‘overall control’ over the military forces of one of the parties to that conflict.”

See also *Brđjanin*, (Trial Chamber), September 1, 2004, footnote 319: “describing the three different tests: 1) For single private individuals or groups, not militarily organised, acting as a *de facto* organ of the State., it is necessary to ascertain that the said State has issued specific instructions concerning the commission of that particular act or that it has publicly endorsed or approved the unlawful act *ex post facto*; 2) for armed forces, militias or paramilitary units acting as *de facto* organs of the State, the establishment of the overall character of the control suffices and 3) private individuals who are assimilated to State organs on account of their actual behaviour within the structure of the State may be regarded as *de facto* organs of the State, regardless of any possible requirement of State instructions.”

(4) overall control test satisfied where a state has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 306, 308: “The *Tadić* Appeal Judgement addressed in detail the circumstances under which armed forces may be regarded as acting on behalf of a foreign state, thereby rendering the armed conflict international. The Appeals Chamber in that case determined the elements of a foreign state’s *overall control* over such armed forces:

[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). [...] The control required by international law may be deemed to exist when a State [...] *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.”

“The *Tadić* Appeal Judgement initially held that:

[one] should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up *an organised and hierarchically structured group*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient

to require that the group as a whole be under the overall control of the State. The Appeals Chamber agrees with this analysis.” (emphasis in original)

Tadić, (Appeals Chamber), July 15, 1999, paras. 137, 138: “[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.” “[I]f the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.” (emphasis in original) *See also Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 184 (quoting same).

Brdjanin, (Trial Chamber), September 1, 2004, para. 124: “The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in (i) organising, coordinating or planning the military actions of the military group, in addition to (ii) financing, training and equipping or providing operational support to that group. These two elements must both be satisfied.”

(5) do not just look at the locality where the crimes occurred to determine if conflict is international

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 319-321: “The Appeals Chamber recalls that the *Tadić* Appeal Decision on Jurisdiction explained that ‘the very nature of the [Geneva] Conventions – particularly [Geneva] Conventions III and IV – dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.’ It further held that in the case of an armed conflict, until a peaceful settlement is achieved, ‘international humanitarian law continues to apply in the *whole* territory of the warring

States [...], whether or not actual combat takes place there.’ It concluded that ‘[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.’ The Appeals Chamber also held that ‘the conflicts in the former Yugoslavia have both internal and international aspects.”

“In the light of these findings, the Appeals Chamber holds that the Trial Chamber correctly found that:

[t]he determination as to whether the conflict is international or internal has to be made on a case-by-case basis, that is, each case has to be determined on its own merits, and accordingly, it would not be permissible to deduce from a decision that an internal conflict in a particular area in Bosnia was internationalised that another internal conflict in another area was also internationalised. However, it would be wrong to construe the Appeals Chamber’s Decision as meaning that evidence as to whether a conflict in a particular locality has been internationalised must necessarily come from activities confined to the specific geographical area where the crimes were committed, and that evidence of activities outside that area is necessarily precluded in determining that question.”

“This reasoning is supported by the purpose of the Geneva Conventions. Once an armed conflict has become international, the Geneva Conventions apply throughout the respective territories of the warring parties. Accordingly, the Trial Chamber did not err by taking into account the situation in other areas within Bosnia and Herzegovina linked to the armed conflict in Central Bosnia when examining the international character of the armed conflict.” (emphasis in original) *See also Tadić*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70 (source of various quoted language); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 70 (source of indented quote).

Blaskić, (Trial Chamber), March 3, 2000, para. 64: “It is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part.”

(6) failure to recognize state of war irrelevant

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 373: “[T]he Appeals Chamber turns to the argument that there was no international armed conflict between Croatia and Bosnia and Herzegovina because they denied the existence of a state of war between them. Without prejudice to the factual veracity of this claim, the Appeals Chamber finds any such argument irrelevant. Article 2 of Geneva Convention IV speaks of ‘armed conflict [...] between two or more of the High Contracting Parties, even if the

state of war is not recognised by *one* of them.’ However, this article cannot be interpreted to rule out the characterisation of the conflict as being international in a case when *none* of the parties to the armed conflict recognises the state of war. The purpose of Geneva Convention IV, *i.e.* safeguarding the protected persons, would be endangered if States were permitted to escape from their obligations by denying a state of armed conflict. The Appeals Chamber recalls that ‘[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.’” (emphasis in original)

(7) pleading international armed conflict

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 113: “Following the *Kupreskic* guidelines, the Appeals Chamber has clarified that what an Indictment needs to plead in relation to an allegation that an armed conflict was international is the fact that the armed conflict was international in character, and the basis upon which such an assertion is made: ‘the Prosecution would be obliged to identify the foreign entity under whose overall control one of the parties to that conflict is alleged to have been acting.’ The Trial Chamber in *Hadzijasovic* held that the Indictment in that case, which referred to a ‘state of international armed conflict’ without more was defective, and ordered the Prosecution ‘to amend the Indictment to clearly state between which states it is alleging an international armed conflict existed.’”

(a) application—pleading international armed conflict

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 120: “The importance of adequate pleadings before trial is to allow the Defence to conduct a search for material evidence and potential witnesses before trial to enable them to fully prepare cross-examination of the Prosecution witnesses during the Prosecution case. This level of preparation allows the Defence to elicit evidence which supports the Defence case during their cross-examination of Prosecution witnesses as envisaged by Rule 90(II). The Trial Chamber concludes that the defect in the Amended Indictment in relation to the pleading of the existence of an international armed conflict was not cured by the Prosecution before the start, and during trial, and that the preparation of the Defence of the Accused was materially impaired. Consequently, the Trial Chamber considers that the evidence presented on the existence of an international armed conflict shall be excluded as being outside the scope of the Amended Indictment. As proof of the existence of an international armed conflict is one of the requisite jurisdictional elements for a charge based on Article 2 of the Statute, the Trial Chamber concludes that Count 3 is untenable and is therefore dismissed.”

(8) application—international armed conflict

(a) conflict between Bosnia and Herzegovina, and Croatia

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 342, 350, 355, 360, 361, 369: “The Trial Chamber held that the armed conflict in Central Bosnia was of an international character, owing both to Croatia’s direct intervention and its overall control of the HVO [Croatian Defence Council].” “The Appeals Chamber observes that the appealed counts relate to the period between October 1992 and September 1993, and will thus focus on this period when examining the finding that the conflict was international.”

“The Appeals Chamber finds that on the basis of [the] evidence, even taking into account that there was no requirement for Croatian troops to be present in Central Bosnia, that no reasonable trier of fact could have found that Croatia *directly* intervened in the armed conflict in Central Bosnia.” “The Appeals Chamber is aware that deference is due to these findings by the Trial Chamber, which under the Statute has the primary responsibility for hearing and evaluating the evidence presented before it. However, the evidence is inadequate to an extent that a reasonable trier of fact could not have established beyond reasonable doubt that Croatian troops were indeed sent to Central Bosnia.”

“The Appeals Chamber now turns to the question of whether the HVO [Croatian Defence Council] acted on behalf of Croatia. It will examine whether the Trial Chamber erroneously held that these criteria were satisfied and thus Croatia exercised overall control over the HVO:

- a) The provision of financial and training assistance, military equipment and operational support;
- b) Participation in the organisation, coordination or planning of military operations.”

“The Appeals Chamber finds that on the basis of the evidence set out above a reasonable trier of fact could have found beyond reasonable doubt that Croatia exercised overall control over the HVO at the relevant time.” (emphasis in original)

Kordić and Cerkez, (Trial Chamber), February 26, 2001, paras. 108-146: The Trial Chamber concluded that the relevant issues were (a) whether Croatia intervened in the armed conflict between the Bosnian Muslims and the Bosnian Croats in Bosnia and Herzegovina through its troops and, alternatively, (b) whether the HVO [Croatian Defence Council] acted on behalf of Croatia. “The Chamber concludes that the evidence in this case satisfies each of the alternative criteria set forth . . . for internationalising an internal conflict.”

Blaskić, (Trial Chamber), March 3, 2000, paras. 83-123: The Trial Chambers concluded that “[b]ased on Croatia’s direct intervention in BH [Republic of Bosnia and

Herzegovina” there was “ample proof to characterise the conflict as international,” and that Croatia’s “indirect control over the HVO [Croatian Defence Council] and HZHB [Croatian Community of Herceg-Bosna]” and “indirect intervention” would “permit the conclusion that the conflict was international.” The Trial Chamber found that “Croatia, and more specifically former President Tudjman, was hoping to partition Bosnia and exercised such a degree of control over the Bosnian Croats and especially the HVO that it is justified to speak of overall control. [T]he close ties between Croatia and the Bosnian Croats did not cease with the establishment of the HVO.”

Prosecutor v. Rajic, Case No. IT-95-12 (Trial Chamber), Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence,² September 13, 1996, paras. 13, 26, 32: “[F]or purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one.” “[B]etween 5000 to 7000 members of the Croatian Army, as well as some members of the Croatian Armed Forces (‘HOS’), were present in the territory of Bosnia and were involved, both directly and through their relations with Croatian Community of Herceg-Bosna (‘HIB’) and the Croatian Defence Council (‘HVO’), in clashes with Bosnian Government forces in central and southern Bosnia. [T]he Bosnian Croats can, for the purposes of these proceedings, be regarded as agents of Croatia in respect of discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions. It appears that Croatia, in addition to assisting the Bosnian Croats . . . inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.”

(b) conflict between Bosnia and Herzegovina, and the Federal Republic of Yugoslavia (Serbia and Montenegro)

Delalic et al., (Appeals Chamber), February 20, 2001, paras. 33, 48, 50: “The Trial Chamber’s finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in *Tadic* that it is indisputable that an armed conflict is international if it takes place between two or more

² “Rule” or “Rules” hereinafter refer to the ICTY Rules of Procedure and Evidence, as amended, located at <http://www.un.org/icty/legal/doc-e/index.htm>.

States,' which reflects the traditional position of international law. . . ." "Although the Trial Chamber did not formally apply the 'overall control' test set forth by the *Tadić* Appeal Judgement, . . . the Trial Chamber's legal reasoning is entirely consistent with the previous jurisprudence of the Tribunal." "The Trial Chamber came to the conclusion, as in the *Tadić* case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international because the FRY [the Federal Republic of Yugoslavia (Serbia and Montenegro)] remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992. . . . [T]his Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfil the legal conditions as set forth in the *Tadić* case."

Tadić, (Appeals Chamber), July 15, 1999, paras. 156, 162: "It is sufficient to show that [the Yugoslav Army] exercised overall control over the Bosnian Serb Forces. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS [the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska]. This sort of control is sufficient for the purposes of the legal criteria required by international law." "[F]or the period material to this case (1992), the armed forces of the *Republika Srpska* were to be regarded as acting under the overall control of and on behalf of the FRY [the Federal Republic of Yugoslavia (Serbia and Montenegro)]. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict." See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 87.

For application of the "overall control" test, the issue of "participation," and the finding that the armed conflict in the Autonomous Region of Krajina from April 1, 1992 through December 31, 1992 was international, see *Brđjanin*, (Trial Chamber), September 1, 2004, paras. 144-154.

iv) the person or property at issue must be "protected" (element 4)

Blaskić, (Appeals Chamber), July 29, 2004, para. 172: "[T]he offences covered by Article 2 of the Statute must be committed against persons or property protected under the provisions of the relevant Geneva Conventions."

Brđjanin, (Trial Chamber), September 1, 2004, para. 121: "[T]he victims of the alleged crimes must qualify as protected persons pursuant to the provisions of the 1949 Geneva Conventions." See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 106 (similar).

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 176: The fourth requirement for applicability of Article 2 of the Statute is “the persons or property subject of grave breaches must be defined as ‘protected’ in the Geneva Conventions.”

(1) protected persons defined

Blaskić, (Appeals Chamber), July 29, 2004, para. 172: “Article 4(1) of Geneva Convention IV defines protected persons as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals.’” *See also Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 147 (same).

Tadić, (Appeals Chamber), July 15, 1999, para. 168: “Protected persons” are those “who do not enjoy . . . diplomatic protection,” and “are not subject to the allegiance and control, of the State in whose hands they may find themselves.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 125: “Each of the four 1949 Geneva Conventions respectively sets out the conditions under which a person or property is protected by its provisions.” “Geneva Convention IV defines ‘protected persons’ as those ‘in the hands of a party to the conflict or Occupying Power of which they are not nationals.’”

Blaskić, (Trial Chamber), March 3, 2000, para. 145: “[I]n those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person.”

(2) ethnicity, allegiance, and substance of relations more determinative of protected status than nationality or legal characterization

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 322-323, 328-330: “The Trial Chamber followed the Appeals Chamber’s judgements in *Tadić*, *Aleksovski* and *Čelebići* [a/k/a *Delalić*] and held that in determining the protected status of a person pursuant to Article 4 of Geneva Convention IV, it was not bound by the common citizenship of both perpetrators and victims and could instead apply the *allegiance* test, which provides that nationality is not as crucial as allegiance to a party to the armed conflict.” “It also held that if it is established that the conflict was international by reason of Croatia’s participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV applies.” “The Appeals Chamber notes that this issue has been thoroughly discussed in four Appeal judgements. In these

decisions the Appeals Chamber rejected arguments that the victims of grave breaches of Geneva Convention IV should be excluded from the status of 'protected persons' according to a strict construction of the language of its Article 4. Likewise, the Appeals Chamber rejected allegations that its interpretation of this norm violates the principle of legality." "[Victims] are protected as long as they owe no allegiance to the Party to the conflict in whose hands they find themselves and of which they are nationals." *See also Kordić and Čerkez*, (Appeals Chamber), December 17, 2004, para. 331.

Blaskić, (Appeals Chamber), July 29, 2004, paras. 172, 180: "The *Tadić* Appeals Chamber concluded that this provision [Article 4(1) of the Geneva Convention IV], 'if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependant on formal bonds and purely legal relations.' . . ." "[T]he Appeals Chamber has previously rejected arguments that the victims should be excluded from the status of 'protected persons' according to a strict construction of the language of Article 4 of Geneva Convention IV."

Delalić et al., (Appeals Chamber), February 20, 2001, para. 84: "The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State."

Tadić, (Appeals Chamber), July 15, 1999, paras. 166-169: "[T]he legal approach [for defining protected persons], hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons." It is "the substance of relations" between the parties, "not . . . their legal characterisation" which is controlling. "[T]he victims were 'protected persons' as they found themselves in the hands of armed forces of a State of which they were not nationals" and they "did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting."

Brdjanin, (Trial Chamber), September 1, 2004, para. 125: "The criterion of nationality might exclude certain victims of crimes from the category of protected persons. However, it is settled jurisprudence of this Tribunal that protected persons should not

be defined by the strict requirement of nationality, as opposed to more realistic bonds demonstrating effective allegiance to a party to a conflict, such as ethnicity. This Trial Chamber agrees with and will follow this approach.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 152: “[T]he Appeals Chamber in *Tadic* concluded that ‘allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.’ In such a case, nationality is not as crucial as allegiance to a party.”

Blaskic, (Trial Chamber), March 3, 2000, paras. 126-127: The Trial Chamber followed the *Tadic* Appeals Chamber which chose a “legal approach hinging more on substantial relations than on formal bonds,”” “In an inter-ethnic armed conflict, a person’s ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons.”

(3) protected persons can be same nationality as captor

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 329-330: “The Appeals Chamber reiterates that:

[...] depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions.”

“It finds that Article 4 of Geneva Convention IV cannot be interpreted in a way that would exclude victims from the protected persons status merely on the basis of their common citizenship with a perpetrator.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 174: “In interpreting Article 4 of Geneva Convention IV, the Appeals Chamber concluded that:

In today’s ethnic conflicts, the victims may be ‘assimilated’ to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadic* Appeal Judgement that ‘even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.’”

Delalić et al., (Appeals Chamber), February 20, 2001, para. 81: “[D]epriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions.”

Aleksovski, (Appeals Chamber), March 24, 2000, para. 151: “[T]he Appeals Chamber also confirms the finding in the *Tadić* Judgement that, in certain circumstances, Article 4 [of Geneva Convention IV] may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.”

**(4) “in the hands of a party to the conflict or occupying power”
defined**

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 208: The Chamber held that “the expression ‘in the hands of a party or occupying power, as it appears in Article 4 of Geneva Convention IV, refers to persons finding themselves on the territory controlled by that party or occupying power.”

(5) application—protected persons

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 375-377: “With regard to the protected persons requirement, Cerkez submits that Bosnian Muslim civilians who were victimised by Bosnian Croats [in Central Bosnia and Herzegovina] would still not be protected persons under the Geneva Conventions because Croatia and Bosnia and Herzegovina were in an alliance, fighting the Bosnian Serbs and the JNA [the Army of the Socialist Federal Republic of Yugoslavia].” “The Appeals Chamber notes that the Trial Chamber reasonably came to the conclusion that the conflict between the HVO [Croatian Defence Council] and the ABiH [Bosnian Muslim Army] was international, due to Croatia’s overall control over the HVO. Croatia and Bosnia and Herzegovina could therefore be considered belligerents, pursuant to Article 4(2) of Geneva Convention IV. This, in itself, establishes that they were not in alliance as co-belligerents within the meaning of Article 4(2) for the purpose of crimes arising out of the conflict in Central Bosnia.” “The Trial Chamber did therefore not err in holding that the Bosnian Muslims were protected persons under Article 4 of Geneva Convention IV.”

Blaskić, (Appeals Chamber), July 29, 2004, paras. 175, 177, 189: “The Appeals Chamber notes that the Trial Chamber found that Croatia was a Party to the conflict in question. The Bosnian Muslims were held captive by the HVO [Croatian Defense Council (army of the Bosnian Croats)] and they owed no allegiance to Croatia. Given that the HVO

was operating *de facto* as Croatia's armed forces, the Bosnian Muslim victims found themselves in the hands of a Party to the conflict of which they were not nationals. The nationalities of the individuals comprising Croatia's *de facto* armed forces are not relevant to the inquiry."

"[T]here is no merit in the Appellant's assertion that the present case can be distinguished from the *Tadić* and *Celebići* [a/k/a *Delalić*] cases on the basis that the Bosnian Serbs, unlike the Bosnian Croats, were attempting to secede from Bosnia-Herzegovina. Neither the *Tadić* Appeal Judgement nor the *Celebići* Appeal Judgement turned on the secessionist activities of the Bosnian Serbs."

Rejecting appellant's argument that Croatia and Bosnia-Herzegovina were co-belligerents: "The Appeals Chamber finds that the Trial Chamber had ample evidence to conclude within the ambit of a reasonable trier of fact that the States of Croatia and Bosnia-Herzegovina were not co-belligerents within the meaning of Article 4(2) of Geneva Convention IV."

Delalić et al., (Appeals Chamber), February 20, 2001, para. 98: "The Appeals Chamber particularly agrees with the Trial Chamber's finding that the Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they 'were arrested and detained mainly on the basis of their Serb identity' and 'they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.'"

Aleksoskić, (Appeals Chamber), March 24, 2000, paras. 150-151: "The Prosecution submits that, if it is established that the conflict was international by reason of Croatia's participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable." "The Appeals Chamber agrees with this submission. However, the Appeals Chamber also confirms the finding in the *Tadić* Judgement that, in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors."

v) application—general requirements of Article 2

(1) armed conflict and nexus between the alleged offenses and armed conflict

Brdjanin, (Trial Chamber), September 1, 2004, paras. 140-142: The Trial Chamber found, for purposes of both Articles 2 and 3 of the Statute that there was an armed conflict between April 1 and December 31 [1992] in the Autonomous Region of Krajina ("ARK") and that there was a nexus between the alleged offences and the armed

conflict: “The Chamber is satisfied beyond reasonable doubt that the crimes with which the Accused is charged were committed in the course of the armed conflict in the ARK. Although the Accused did not take part in any fighting, his acts were closely related to the conflict. Indeed, the Accused was a prominent member of the SDS [Serbian Democratic Party of Bosnia and Herzegovina] and later also President of the ARK Crisis Staff, a regional body vested with both executive and legislative powers within the ARK where the armed conflict was taking place. Its effective powers extended to the municipal authorities of the ARK and the police and its influence encompassed the army and paramilitary organisations. In the following Chapter of this judgement, the Trial Chamber will establish the ARK Crisis Staff’s involvement in the implementation of the Strategic Plan. The Trial Chamber will later establish that, after the ARK Crisis Staff was abolished and throughout the period relevant to the Indictment, the Accused continued to wield great power and acted in various positions at the republican level in the course of the armed conflict.” “The Trial Chamber is thus satisfied that the general requirements common to Articles 2 and 3 of the Statute are fulfilled.”

(2) armed conflict was international

Brđjanin, (Trial Chamber), September 1, 2004, paras. 144-154: “In order to establish that the armed conflict in the present case was international in nature, the Trial Chamber needs to be satisfied that, between 1 April 1992 and 31 December 1992, the FRY [Federal Republic of Yugoslavia] authorities either intervened directly in the armed conflict or had overall control over Bosnian Serb forces. The Trial Chamber is satisfied that from 1 April 1992 to 19 May 1992, when the JNA [Yugoslav Peoples’ Army] officially withdrew from BiH [Bosnia and Herzegovina], that the JNA intervened directly in the armed conflict occurring on the territory of BiH and that the armed conflict was thus international during this period. Hence, the period of concern to the Trial Chamber is 19 May to 31 December 1992, during which time there is no evidence of direct foreign intervention.” “The Trial Chamber thus concludes that the armed conflict that took place in the ARK throughout the entire period of the Indictment was international in nature.”

(3) victims were protected persons

Brđjanin, (Trial Chamber), September 1, 2004, paras. 155-156: “With respect to the requirement that victims be protected persons, the Trial Chamber notes that the victims of the alleged crimes did not owe allegiance to the State on whose behalf the Bosnian Serb armed forces were fighting. The Trial Chamber is thus satisfied, in conformity with the jurisprudence of the Tribunal, that the victims of the crimes alleged in the Indictment were persons ‘protected’ by the Geneva Conventions of 1949.”

“On these bases the Trial Chamber is satisfied that the requirements for the application of Article 2 of the Statute are met.”

c) *Mens rea*

i) generally

Blaskić, (Trial Chamber), March 3, 2000, para. 152: “[T]he *mens rea* constituting all the violations of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence.”

See also discussion of the *mens rea* for willful killing, Section (I)(d)(i)(4), ICTY Digest; *mens rea* for torture, Section (I)(d)(ii)(1)(a), ICTY Digest; *mens rea* for willfully causing great suffering or serious injury to body or health, Section (I)(d)(iii)(1), ICTY Digest; *mens rea* for extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, Section (I)(d)(iv)(6), ICTY Digest; and *mens rea* for unlawful transfer, Section (I)(d)(vii)(2), ICTY Digest.

ii) knowledge of existence of international armed conflict

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 311: “The *nullum crimen sine lege* principle does not require that an accused knew the specific *legal* definition of each element of a crime he committed. It suffices that he was aware of the *factual* circumstances, e.g. that a foreign state was involved in the armed conflict. It is thus not required that Kordić could make a correct legal evaluation as to the international character of the armed conflict. Consequently, it is irrelevant whether Kordić believed that the *effective control* test constituted international customary law.” (emphasis in original)

iii) distinguish intent from motive

Prosecutor v. Krnojelac, Case No. T-97-25-A (Appeals Chamber), September 17, 2003, para. 102: “The Appeals Chamber . . . recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out ‘the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.’ It is the Appeals Chamber’s belief that *this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.*” (emphasis added) See also *Prosecutor v. Jelisić*, Case No. IT-95-10 (Appeals Chamber), July 5, 2001, para. 49 (same quoted language).

d) Underlying offenses

i) willful killing (Article 2(a))

(1) defined

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 36: “The Appeals Chamber recalls that the elements of wilful killing under Article 2 of the Statute are the death of the victim as the result of the action(s) of the accused, who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death, and which he committed against a protected person.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 381: “Save for some insignificant variations in expressing the constituent elements of the crime of murder and wilful killing, which are irrelevant for this case, the jurisprudence of this Tribunal has consistently defined the essential elements of these offences as follows:

1. The victim is dead;
2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
3. The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
 - to kill, or
 - to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 382: “The *actus reus* consists in the action or omission of the accused resulting in the death of the victim. The Prosecution need only prove beyond reasonable doubt that the accused’s conduct contributed substantially to the death of the victim.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 229: “[I]n relation to the crime of wilful killing, the *actus reus* – the physical act necessary for the offence – is the death of the victim as a result of the actions or omissions of the accused. [T]he conduct of the accused must be a substantial cause of the death of the victim, who must have been a ‘protected person.’”

Blaskić, (Trial Chamber), March 3, 2000, para. 153: “For the material element of the offence, it must be proved that the death of the victim was the result of the actions of the accused. . . .”

(2) whether same as murder under Articles 3 and 5

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 38: “The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person.” *See also Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 229 (the victim “must have been a ‘protected person’”).

Compare Brđjanin, (Trial Chamber), September 1, 2004, para. 380: “It is clear from the Tribunal’s jurisprudence that the elements of the underlying crime of wilful killing under Article 2 of the Statute are identical to those required for murder under Article 3 and Article 5 of the Statute.”

See also Brđjanin, (Trial Chamber), September 1, 2004, para. 381 (characterizing the difference between the constituent elements of the crimes of murder and wilful killing as having “insignificant variations”).

See also “‘murder’ under Article 5 of the Statute, compared to Article 2 (‘wilful killing’) and Article 3 (‘murder’),” Section (IV)(d)(i)(2), ICTY Digest.

(3) no dead body required

Brđjanin, (Trial Chamber), September 1, 2004, paras. 383, 385: “The Trial Chamber concurs with the *Tadić* Trial Chamber that: ‘Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death.’”

“In *Knojelec*, the Trial Chamber held that: ‘Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.’” “The Trial Chamber added that a victim’s death may be established by circumstantial evidence provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused.” (emphasis in original)

Stakić, (Trial Chamber), July 31, 2003, para. 939: “The Trial Chamber finds that, for the purposes of a judgement in criminal matters, where an individual has been either (i)

exhumed and identified, (ii) identified by an eye-witness as being killed or by a witness as still missing or dead, or (iii) named in a death certificate issued by a local court, sufficient evidence exists to conclude beyond reasonable doubt the individual concerned is deceased.”

Prosecutor v. Krnojelac, Case No. IT-97-25 (Trial Chamber), March 15, 2002, para. 327: “The evidence presented by the Prosecution to establish a circumstantial case as to the death of the victims . . . includes such facts as: proof of incidents of mistreatment directed against the individual; patterns of mistreatment and disappearances of other individuals detained . . . ; the general climate of lawlessness . . . where the acts were committed; the length of time which has elapsed since the person disappeared; and the fact that there has been no contact by that person with others whom he would have been expected to contact, such as his family. In essence, the Trial Chamber must be satisfied, looking at the evidence as a whole, that the only reasonable inference from that evidence is that the particular person died as a result of what occurred”

Prosecutor v. Tadić, Case No. IT-94-1 (Trial Chamber), May 7, 1997, para. 240: “The Trial Chamber is cognisant of the fact that during the conflict there were widespread beatings and killings and indifferent, careless and even callous treatment of the dead. Dead prisoners were buried in makeshift graves and heaps of bodies were not infrequently to be seen in the grounds of the camps. Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death.”

(4) *mens rea*

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 36: The *mens rea* for willful killing is that the accused “intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death. . . .”

Brdjanin, (Trial Chamber), September 1, 2004, para. 386: “To satisfy the *mens rea* for murder and wilful killing, it must be established that the accused had an intention to kill or to inflict grievous bodily harm or serious injury in the reasonable knowledge that [the accused’s act or omission] would likely lead to death.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 381 (similar).

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 229: “To satisfy the *mens rea* for wilful killing, it must be established that the accused had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life.”

Blaskic, (Trial Chamber), March 3, 2000, para. 153: “The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.”

(a) no premeditation required

Brđjanin, (Trial Chamber), September 1, 2004, para. 386: “With respect to the requisite *mens rea* of wilful killing under Article 2 of the Statute, the Trial Chamber notes that there has been some debate within the jurisprudence of this Tribunal and the ICTR³ regarding the question whether the *mens rea* threshold for murder, and *mutatis mutandis* wilful killing, requires a mental element of premeditation. The Trial Chamber finds that the *mens rea* for murder and wilful killing does not require premeditation. In this respect it endorses the *Stakić* Trial Chamber findings that: ‘[B]oth a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he ‘reconciles himself or ‘makes peace’ with the likelihood of death. . . .’” “The threshold of *dolus eventualis* thus entails the concept of recklessness, but not that of negligence or gross negligence.” (emphasis omitted in original)

(b) *mens rea* may be inferred either directly or circumstantially

Brđjanin, (Trial Chamber), September 1, 2004, para. 387: “[T]he Trial Chamber notes that the *mens rea* may . . . be inferred either directly or *circumstantially* from the evidence in the case.” (emphasis in original)

See also discussion of murder under Article 3, Section (II)(d)(iv), and murder under Article 5, Section (IV)(d)(i), ICTY Digest.

³ “ICTR” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

ii) torture or inhuman treatment (Article 2(b))

(1) torture

(a) elements

Brđjanin, (Trial Chamber), September 1, 2004, para. 481: “Both this Tribunal and the ICTR have adopted a definition of the crime of torture along the lines of that contained in the Convention against Torture (“CAT”), which comprises the following constitutive elements:

1. the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
2. the act or omission must be intentional; and
3. the act or omission must have occurred in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.”

(b) same regardless of article

Brđjanin, (Trial Chamber), September 1, 2004, para. 482: “The definition of ‘torture’ remains the same regardless of the Article of the Statute under which the Accused has been charged.”

(c) severity of pain or suffering

Brđjanin, (Trial Chamber), September 1, 2004, paras. 483, 484: “The seriousness of the pain or suffering sets torture apart from other forms of mistreatment. The jurisprudence of this Tribunal and of the ICTR has not specifically set the threshold level of suffering or pain required for the crime of torture, and it consequently depends on the individual circumstances of each case.”

“In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm.”

(i) permanent injury not required

Brđjanin, (Trial Chamber), September 1, 2004, para. 484: “Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.”

(ii) rape meets severity requirement

Brđjanin, (Trial Chamber), September 1, 2004, para. 485: “Some acts, like rape, appear by definition to meet the severity threshold. Like torture, rape is a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person. Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”

(d) prohibited purpose required

Brđjanin, (Trial Chamber), September 1, 2004, paras. 486-487: “Acts of torture aim, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even a very severe infliction of pain would not qualify as torture for the purposes of Article 2 and Article 5 of the Statute.” “The prohibited purposes mentioned above do not constitute an exhaustive list, and there is no requirement that the conduct must *solely* serve a prohibited purpose. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose is immaterial.” (emphasis in original)

(e) public official not required

Brđjanin, (Trial Chamber), September 1, 2004, paras. 488-489: “Even though the [Convention Against Torture] envisages that torture be committed ‘with the consent or acquiescence of a public official or other person acting in an official capacity,’ the jurisprudence of this Tribunal does not require that the perpetrator of the crime of torture be a public official, nor does the torture need to have been committed in the presence of such an official.”

“In this context, the Trial Chamber notes that the definition of the [Convention Against Torture] relies on the notion of human rights, which is largely built on the premises that human rights are violated by States or Governments. For the purposes of international criminal law, which deals with the criminal responsibility of an individual, this Trial Chamber agrees with and follows the approach of the *Kunarac* Trial Chamber that ‘the characteristic trait of the offence [under the Tribunal’s jurisdiction] is to be found in the nature of the act committed rather than in the status of the person who committed it.”²⁹

See also discussion of torture under Article 3, Section (II)(d)(i), and Article 5, Section (IV)(d)(vi), ICTY Digest.

(2) inhuman treatment

(a) generally

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 246: “[O]ffences of inhuman treatment and cruel treatment are residual clauses under Articles 2 and 3 of the Statute respectively. Materially, the elements of these offences are the same.” “The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of wilfully causing great suffering or serious injury to body or health.”

(b) defined

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 39: “The Appeals Chamber recalls that inhuman treatment under Article 2 of the Statute is an intentional act or omission committed against a protected person, causing serious mental harm, physical suffering, injury or constitutes a serious attack on human dignity.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 665: “Inhuman treatment under Article 2 is distinct from ‘cruel treatment’ under Article 3, and has been described as:

(a) an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.

(b) committed against a protected person.

See also Aleksowski, (Appeals Chamber), March 24, 2000, para. 26 (quoting first prong of test); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 256 (both prongs).

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 246: “Inhuman treatment is defined as a) an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, b) committed against a protected person.”

Blaskić, (Trial Chamber), March 3, 2000, paras. 154-155: “[I]nhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity [. . .] Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed “grave breaches” in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.” “[T]he category ‘inhuman treatment’ included not only acts such as torture and intentionally causing great suffering or inflicting serious injury to body, mind or health but also

extended to other acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on human dignity.”

(c) application—inhuman treatment

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 256: “[I]njuries, inhuman treatment of detainees, and use of persons as human shields may be characterized as ‘inhuman treatment.’”

(i) use of persons as “human shields”

Blaskić, (Appeals Chamber), July 29, 2004, paras. 653, 654, 669: “The use of prisoners of war or civilian detainees as human shields is . . . prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively where the other elements of these crimes are met.” “Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself.” “The Appeals Chamber considers that the use of the detainees as human shields caused them serious mental harm and constituted a serious attack on human dignity.”

(ii) forced labor

Blaskić, (Appeals Chamber), July 29, 2004, para. 597: “The Appeals Chamber has noted that the use of forced labour is not always unlawful. Nevertheless, the treatment of non-combatant detainees may be considered cruel where, together with the other requisite elements, that treatment causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The Appeals Chamber notes that Geneva Conventions III and IV require that when non-combatants are used for forced labour, their labour may not be connected with war operations or have a military character or purpose. The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against ‘their own forces in an armed conflict, constitutes cruel treatment’”⁴

⁴ The court theorized that it could enter convictions under both Article 2 for inhuman treatment and Article 3 for cruel treatment. The conviction was entered under Article 2 on the grounds that Article 2 (via Common Article 3 to the Geneva Conventions) has an additional element not present in Article 3. See *Blaskić*, (Appeals

See also discussion of cruel treatment under Article 3, Section (II)(d)(iii), ICTY Digest. See also discussion of cruel and inhuman treatment underlying the crime of persecution under Article 5, Section (IV)(d)(viii)(3)(i), ICTY Digest.

**iii) willfully causing great suffering or serious injury to body or health
(Article 2(c))**

(1) defined

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 54: “The Tribunal has held that an attack on cities, towns or villages is analogous to an ‘attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings,’ and thus constitutes ‘a violation of the laws or customs of war enumerated under Article 3 (c) of the Statute.’ As a violation of the laws or customs of war under Article 3 of the Statute, the attack ‘must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property.’”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 245: “[T]he crime of willfully causing great suffering or serious injury to body or health constitutes an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven.” “As with all offences charged under Article 2 of the Statute, there is a further requirement that the acts must have been directed against a ‘protected person.’”

Blaskić, (Trial Chamber), March 3, 2000, para. 156: “This offence [willfully causing great suffering or serious injury to body or health] is an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health. This category of offences includes those acts which do not fulfil the conditions set for the characterisation of torture, even though acts of torture may also fit the definition given. An analysis of the expression ‘willfully causing great suffering or serious injury to body or health’ indicates that it is a single offence whose elements are set out as alternative options.”

Chamber), July 29, 2004, paras. 634 and 671. For discussion of cumulative convictions, see (IX)(b), ICTY Digest.

(2) requires showing of serious mental or physical injury, although need not be permanent or irremediable

Naletilić and Martinović, (Trial Chamber), March 31, 2003, paras. 340-341: “The Commentary to Article 147 of Geneva Convention IV describes the offence of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering. In describing serious injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work.” “This offence includes those acts that do not fulfil the conditions set for torture even though acts of torture may also fit the definition given. . . . [S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 245: “This crime [wilfully causing great suffering or serious injury to body or health] is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual’s human dignity are not included within this offence.”

iv) extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly (Article 2(d))

(1) generally

Brđanin, (Trial Chamber), September 1, 2004, paras. 584-585: “The extensive destruction and appropriation of property not justified by military necessity carried out unlawfully and wantonly constitutes a grave breach under Article 2 (d) of the Statute. This single article combines two separate acts: the (i) destruction of property and (ii) appropriation of property.” “Article 2(d) is based on Article 147 of Geneva Convention IV, which sanctions as a grave breach the extensive destruction and appropriation of property protected by the Convention, not justified by military necessity and carried out unlawfully and wantonly.”

(2) elements

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 577: “[A] crime under Article 2(d) of the Statute has been committed when:

- i) the general requirements of Article 2 of the Statute are fulfilled;
- ii) property was destroyed extensively;
- iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or, the extensive destruction not absolutely necessary by military operations regards property situated in occupied territory;
- iv) the perpetrator acted with the intent to destroy this property or in reckless disregard of the likelihood of its destruction.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 341: “[T]he crime of extensive destruction of property as a grave breach comprises the following elements, either:

- (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or
- (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and
- (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.”

(3) two types of property protected

Brđjanin, (Trial Chamber), September 1, 2004, para. 586: “Two types of property are protected under Article 2 (d):

- 1. real or personal property in occupied territory, belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations (except where such destruction is rendered absolutely necessary by military operations);
- 2. property that carries general protection under the Geneva Conventions of 1949 regardless of its location.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 575: “[T]wo types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory when the destruction was not absolutely necessary by military operations.”

(4) extensive destruction required

Brđjanin, (Trial Chamber), September 1, 2004, para. 587: “The destruction and appropriation must be extensive. However, a single incident, such as the destruction of a civilian hospital, may exceptionally suffice to constitute the crime.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 576: “The Chamber holds that Article 2(d) of the Statute requires the destruction to be extensive regardless of whether the property is characterised as carrying general protection or is protected because it is situated on occupied territory. A single act may, in exceptional circumstances, be interpreted as fulfilling the requirement of extensiveness, as for instance the bombing of a hospital.”

Blaskić, (Trial Chamber), March 3, 2000, para. 157: “To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of ‘extensive’ is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.”

(5) prohibition of destruction of property situated in occupied territory inapplicable where there is absolute military necessity

Brđjanin, (Trial Chamber), September 1, 2004, para. 588: “The prohibition of destruction of property situated in occupied territory is subject to an important reservation. It does not apply in cases ‘where such destruction is rendered absolutely necessary by military operations.’”

Blaskić, (Trial Chamber), March 3, 2000, para. 157: “An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations.”

See also Kordić and Cerkez, (Appeals Chamber), December 17, 2005, para. 686: “‘Military necessity’ has already been defined in Article 14 of the Lieber Code of 24 April 1863 as the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

It follows that the unnecessary or wanton application of force is prohibited and that ‘a belligerent may apply only that amount and kind of force necessary to defeat the enemy.’ This principle is, *e.g.*, the basis for the prohibition on employing arms, projectiles, or material calculated to cause unnecessary suffering (Article 23[e] of Hague Convention IV).”

(6) *mens rea*

Brdjanin, (Trial Chamber), September 1, 2004, para. 589: “With regards to the *mens rea* requirement for destruction of property the perpetrator must have acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction.” See also *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 577 (same); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 341 (same test).

See also discussion of “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” under Article 3, Section (II)(d)(viii), ICTY Digest. See also “destruction of property or means of subsistence” as underlying the crime of persecution under Article 5, Section (IV)(d)(viii)(3)(a), ICTY Digest,

- v) compelling a prisoner of war or a civilian to serve in the forces of a hostile power (Article 2(e))**
- vi) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial (Article 2(f))**
- vii) unlawful deportation or transfer or unlawful confinement of a civilian (Article 2(g))**

(1) unlawful confinement

(a) generally

Delalic et al., (Appeals Chamber), February 20, 2001, paras. 322, 327: “[T]he exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42 [Geneva Convention IV], and where the provisions of Article 43 [Geneva Convention IV] are complied with. Thus the detention or confinement of civilians will be unlawful in the following two circumstances: (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.* they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and (ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.” “It is perfectly clear from the provisions of Geneva Convention IV . . . that there is no such blanket power to detain the entire civilian population of a party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a particular risk to the security of the State.” “[T]he mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living, and is not, therefore, a valid reason for interning him.”

Cf. Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 158: “The Appeals Chamber notes that imprisonment and unlawful confinement are crimes which are distinct from forcible transfer or expulsion.”

(b) unlawful confinement has same elements as imprisonment under Article 5

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 63: “The Trial Chamber in *Kordic* held that the elements of the crime of unlawful confinement under Article 2 of the Statute, and the elements of the crime of imprisonment under Article 5 of the Statute are identical. The Trial Chamber in the *Krnjelac* Judgement shared this view, but also considered that as a crime against humanity, the definition of imprisonment was not restricted by the grave breaches provisions of the Geneva Conventions.”

For discussion of imprisonment under Article 5, see Section (IV)(d)(v), ICTY Digest.

(c) responsibility more properly allocated to those responsible for detention, not those who merely participate in it, such as those who maintain a prison

Delalic et al., (Appeals Chamber), February 20, 2001, para. 342: “The Appeals Chamber is of the view that to establish that an individual has committed the offence of unlawful confinement, something more must be proved than mere knowing ‘participation’ in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber’s view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has committed a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist, or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist. The Appeals Chamber, however, does not accept that a guard’s omission to take unauthorised steps to release prisoners will suffice to constitute the commission of the crime of unlawful confinement.”

(d) responsibility of camp commander

Delalic et al., (Appeals Chamber), February 20, 2001, paras. 378-379: “[A] person in the position of Mucic [commander of the Celebici prison camp in the village of Celebici] commits the offence of unlawful confinement of civilians where he has the authority to

release civilian detainees and fails to exercise that power, where (i) he has no reasonable grounds to believe that the detainees do not [sic] pose a real risk to the security of the state; or (ii) he knows that they have not been afforded the requisite procedural guarantees (or is reckless as to whether those guarantees have been afforded or not).” “Where a person who has authority to release detainees knows that persons in continued detention have a right to review of their detention and that they have not been afforded that right, he has a duty to release them. Therefore, failure by a person with such authority to exercise the power to release detainees, whom he knows have not been afforded the procedural rights to which they are entitled, commits the offence of unlawful confinement of civilians, even if he is not responsible himself for the failure to have their procedural rights respected.”

(2) unlawful transfer

Naletilić and Martinović, (Trial Chamber), March 31, 2003, paras. 519-521: “Forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing.” “In order [for] the Chamber to be satisfied [that] Article 2(g) of the Statute [has been proven], proof of the following is required: i) the general requirements of Article 2 of the Statute . . . ; ii) the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, lead[s] to the transfer of a person from occupied territory or within occupied territory; iii) the intent of the perpetrator to transfer a person.” “The Prosecution needs to prove the intent to have the person (or persons) removed, which implies the aim that the person is not returning.”

viii) taking civilians as hostages (Article 2(h))

(1) generally

Blaskić, (Appeals Chamber), July 29, 2004, para. 639: “The Appeals Chamber agrees that the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person. The crime of hostage-taking is prohibited by Common Article 3 of the Geneva Conventions, Articles 34 and 147 of Geneva Convention IV, and Article 75(2)(c) of Additional Protocol I.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 314: “[A]n individual commits the offence of taking civilians as hostages when he threatens to subject

civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition.”

Blaskic, (Trial Chamber), March 3, 2000, para. 158: “Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death.” “The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage. The elements of the offence are similar to those . . . covered under Article 3 of the Statute.”

See also discussion of “taking of hostages” under Article 3, Section (II)(d)(vii), ICTY Digest.

(2) application—taking civilians as hostages

For the overturning of *Blaskic*’s conviction for hostage-taking, see *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 635-646.

e) Miscellaneous

i) occupation (relevant to unlawful labor of civilians, unlawful transfer and extensive destruction of property)

(1) where “occupation” is relevant

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 210: “Occupation is relevant in dealing with the charges of unlawful labour of civilians. . . , forcible transfer of a civilian . . . and destruction of property.”

See discussion of unlawful labor under Article 3, Section (II)(d)(xiii); unlawful transfer and “extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly” both under Article 2, Sections (I)(d)(vii)(2) and (I)(d)(iv), ICTY Digest.

(2) definition

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, paras. 214-216: “Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities. This distinction imposes more onerous duties on an occupying power than on a party to an international armed conflict.” The Chamber endorsed the definition of occupation set forth in Article 42 of the Hague Regulations:

"[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." The Chamber stated that the "overall control test, submitted in the *Blaskić* Trial Judgement, is not applicable to the determination of the existence of an occupation. . . . [T]here is an essential distinction between the determination of a state of occupation and that of the existence of an international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation."

(3) guidelines for determining occupation

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 217: The Chamber set out the following guidelines to help "determine whether the authority of the occupying power has been actually established":

- "the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly";
- "the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation";
- "the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt";
- "a temporary administration has been established over the territory";
- "the occupying power has issued and enforced directions to the civilian population."

(4) only applies to areas actually controlled by the occupying power

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 218: "[T]he law of occupation only applies to those areas actually controlled by the occupying power and ceases to apply where the occupying power no longer exercises an actual authority over the occupied area." The court "must determine on a case by case basis whether this degree of control was established at the relevant times and in the relevant places." "[T]here is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning 'are effectively cut off from the rest of the occupied territory.'"

(5) different test would apply regarding individuals or property and other matters

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 222: The Chamber held that it “will have recourse to different legal tests to determine whether the law of occupation applies, depending on whether it is dealing with individuals or with property and other matters.” In the present case, the forcible transfer and the unlawful labor of civilians “were prohibited from the moment that they fell into the hands of the opposing power, regardless of the stage of the hostilities.”

II) WAR CRIMES: VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR (ARTICLE 3)

a) Statute

Article 3:

“The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.”

b) Generally

- i) Article 3 of the Statute functions as a residual clause, covering any serious violation of humanitarian law not covered by other Articles of the Statute**

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paras. 87, 91: “A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all ‘violations of the laws or customs of war’; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.” “Article 3 . . . confers on the International

Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any ‘serious violation of international humanitarian law’ must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.” See also *Prosecutor v. Strugar*, Case No. IT-01-42-T (Trial Chamber), January 31, 2005, para. 218 (quoting *Tadić*); *Prosecutor v. Galić*, Case No. IT-98-29-T (Trial Chamber), December 5, 2003, para. 10 (similar).

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 68: “Article 3 of the Statute is a general and residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute.” See also *Prosecutor v. Halilović*, Case No. IT-01-48-T (Trial Chamber), November 16, 2005, para. 23 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 535 (similar).

Prosecutor v. Jelisić, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 33: “Article 3 of the Statute is a general, residual clause which applies to all violations of humanitarian law not covered under Articles 2, 4 and 5 of the Statute provided that the rules concerned are customary.”

Prosecutor v. Furundžija, Case No. IT-95-17/1 (Trial Chamber), December 10, 1998, paras. 132-133: “Article 3 has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule.” “[M]ore than the other substantive provisions of the Statute, Article 3 constitutes an ‘umbrella rule.’ While the other provisions envisage classes of offences they indicate in terms, Article 3 makes an open-ended reference to all international rules of humanitarian law: pursuant to Article 3 serious violations of any international rule of humanitarian law may be regarded as crimes falling under this provision of the Statute, if the requisite conditions are met.”

ii) conditions for determining which violations fall within Article 3 (the “four *Tadić* conditions”)

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 66: “Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person

breaching the rule.” *See also Prosecutor v. Limaj, Bala and Musliu*, Case No. IT-03-66-T (Trial Chamber), November 30, 2005, para. 175 (same four conditions); *Halilovic*, (Trial Chamber), November 16, 2005, para. 30 (same four conditions); *Strugar*, (Trial Chamber), January 31, 2005, para. 218 (same four conditions); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 537 (same four conditions); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 129 (same four conditions); *Galic*, (Trial Chamber), December 5, 2003, paras. 11, 89 (same four conditions); *Stakeic*, (Trial Chamber), July 31, 2003, para. 580 (same four conditions); *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 123 (same four conditions); *Furundžija*, (Trial Chamber), December 10, 1998, para. 258 (same four conditions).

Strugar, (Trial Chamber), January 31, 2005, para. 218: “It is the view of the Chamber that these conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not.” *Compare Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 41, 45, 46 (where violation is one of treaty law, four *Tadic* criteria need not be satisfied).

iii) violations of international humanitarian law that are covered

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 89: “Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as ‘grave breaches’ by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 126 (same (i)-(iv)); *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 224 (same (i)-(iv)).

See also Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 87: “A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all [violations of the laws or customs of war;] and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.”

(1) violations of Common Article 3 included

Kumarac, (Appeals Chamber), June 12, 2002, para. 68: “Article 3 of the Statute . . . includes, *inter alia*, serious violations of Common article 3. This provision is indeed

regarded as being part of customary international law, and serious violations thereof would at once satisfy the four [*Tadić*] requirements”

Delalić et al., (Appeals Chamber), February 20, 2001, para. 136: “The Appeals Chamber . . . finds no cogent reasons in the interests of justice to depart from its previous jurisprudence concerning the question of whether common Article 3 of the Geneva Conventions is included in the scope of Article 3 of the Statute [– they are included].”

Limaj et al., (Trial Chamber), November 30, 2005, para. 176: “It is settled by the Appeals Chamber that violations of Common Article 3 fall within the scope of Article 3 of the Statute.”

Halilović, (Trial Chamber), November 16, 2005, para. 23: “Article 3 of the Statute has been defined in the jurisprudence of the Tribunal as a general clause covering all violations of humanitarian law not covered by Articles 2, 4 or 5, including violations of Article 3 common to the four Geneva Conventions of 12 August 1949 (‘Common Article 3’) and other customary rules on non-international conflict.”

Strugar, (Trial Chamber), January 31, 2005, para. 219: “At the outset, the Chamber notes that the jurisprudence of the Tribunal in relation to common Article 3 is now settled. . . . [I]t is well established that Article 3 of the Statute covers violations of common Article 3.”

See also *Halilović*, (Trial Chamber), November 16, 2005, para. 31 (violations of Common Article 3 are covered by Article 3 of the Statute); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 539 (same); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 228 (same); *Blaskić*, (Trial Chamber), March 3, 2000, para. 168 (same); *Tadić*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 89 (same).

(2) violations based on treaties included

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 41, 42, 45, 46: “The Appeals Chamber notes that the Trial Chamber considered that Article 3 of the Statute covers not only violations which are based in customary international law but also those based on treaties. It found that Additional Protocol I constituted applicable treaty law in the present case, and found that ‘whether [Additional Protocol I] reflected customary law at the relevant time in this case is beside the point.’” “The Appeals Chamber holds that the Trial Chamber’s approach is correct.”

“The Appeals Chamber wishes to avoid any ambiguity on this issue that may arise from language it used in *Ojđanić*, *Hadžihasanović* and the *Blaskić* Appeal Judgement which, read out of context, could be misunderstood as vesting jurisdiction in this International Tribunal only for crimes based on customary international law at the time

of its commission, but not for treaty-based crimes, however listed in the Statute of this International Tribunal” “The Appeals Chamber stresses that none of these decisions departs from its approach in *Tadić*. As decided on that occasion, the only reason behind the stated purpose of the drafters [of the Statute] that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty.

In each of the three decisions, the legal issues at stake were solved by applying provisions of international customary law. In the present case, however, reference will have to be made to applicable treaty law that established a crime at the time of its commission, provided that this crime is encompassed in the Statute.”

See also Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 42-44 (additional discussion of same issue).

iv) rationale for why Common Article 3 violations are included

(1) violations of Common Article 3 infringe a rule of international humanitarian law

Delalić et al., (Appeals Chamber), February 20, 2001, paras. 143, 150: “It is indisputable that [C]ommon Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based.” “It is both legally and morally untenable that the rules contained in [C]ommon Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of [C]ommon Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. [S]omething which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader.”

See also Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 228: Common Article 3 “applies regardless of the internal or international character of the conflict.”

(2) Common Article 3 is part of customary law

Tadić, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 98: “[S]ome treaty rules have gradually become part

of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions. . . .”

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 68: Common Article 3 “is indeed regarded as being part of customary international law.” See also *Halilovic*, (Trial Chamber), November 16, 2005, para. 31 (“It is . . . well established that Common Article 3 is part of international customary law . . .”); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 539 (same as *Halilovic*); *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 228 (similar); *Blaskic*, (Trial Chamber), March 3, 2000, para. 166 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 176: “[I]t is settled jurisprudence that Common Article 3 forms part of customary international law”

(3) violations of Common Article 3 are serious

Blaskic, (Trial Chamber), March 3, 2000, para. 176: “[V]iolations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute.”

(4) Common Article 3 imposes individual criminal responsibility

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paras. 128-129: “It is true that . . . common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. . . . [T]he International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals. Where these

⁵ Because the second of the “four *Tadic* conditions” is that “the rule must be customary in nature” or, where the required conditions are met, form part of “treaty law,” see, e.g. *Kunarac, Kovac and Vokovic*, (Appeals Chamber) June 12, 2002, para. 66, if the conduct at issue is covered by a binding treaty, constitutes an infringement of international humanitarian law and the treaty provides for individual criminal responsibility, it would not be necessary to determine that the treaty is part of customary law.

conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

“[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

“Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect ‘elementary considerations of humanity’ widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”

Prosecutor v. Delalic, Mucic, Delic and Landzo, Case No. IT-96-21 (Appeals Chamber), February 20, 2001, paras. 162, 171: “[T]he fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT [International Military Tribunal at Nuremberg] indeed followed a similar approach, as recalled in the *Tadic* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations.” “The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 176: “[I]t is settled jurisprudence that customary international law imposes criminal liability for serious violations of Common Article 3”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 228: “[I]t appears from the jurisprudence that [C]ommon Article 3 of the Statute entails individual criminal responsibility.”

Blaskic, (Trial Chamber), March 3, 2000, para. 176: Because violations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common Article 3 are by definition serious violations, “[t]hey are thus likely to incur individual criminal responsibility in accordance with Article 7 of the Statute.” “[C]ustomary

international law imposes criminal responsibility for serious violations of Common Article 3.”

v) application of the four “Tadić” conditions to specific crimes meeting the requirements of Article 3

For discussion that the following crimes satisfy the four “Tadić” conditions, see *Halilović*, (Trial Chamber), November 16, 2005, para. 31 (murder); *Strugar*, (Trial Chamber), January 31, 2005, para. 219 (murder); *Strugar*, (Trial Chamber), January 31, 2005, para. 219 (cruel treatment); *Strugar*, (Trial Chamber), January 31, 2005, paras. 220-222 (attacks on civilians); *Strugar*, (Trial Chamber), January 31, 2005, paras. 224-226 (attacks on civilian objects); *Strugar*, (Trial Chamber), January 31, 2005, paras. 227-233 (destruction and devastation of property, including cultural property); *Brđanin*, (Trial Chamber), September 1, 2004, paras. 157-158 (wanton destruction of cities, towns or villages, or devastation not justified by military necessity, and destruction or willful damage done to institutions dedicated to religion); *Galic*, (Trial Chamber), December 5, 2003, paras. 16-17, 19-20, 25-32 (attacks on civilians); *Galic*, (Trial Chamber), December 5, 2003, paras. 96-98, 107-109, 113-130 (the “crime of terror”).

c) General elements for Article 3 crimes

Limaj et al., (Trial Chamber), November 30, 2005, para. 83: “In order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute, two preliminary requirements must be satisfied. There must be an armed conflict, whether international or internal, at the time material to the Indictment, and, the acts of the accused must be closely related to this armed conflict.” See also *Galic*, (Trial Chamber), December 5, 2003, para. 9 (similar).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 536: “The application of Article 3 of the Statute presupposes the existence of an armed conflict and a nexus between the alleged offence and the armed conflict.”

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S (Trial Chamber), March 18, 2004, para. 12: “The common elements of Article 3 crimes are that, first, there was an armed conflict, whether international or non-international in character, at the time the offences were committed. Second, there was a close nexus between the armed conflict and the offence, meaning that the acts in question were ‘closely related’ to the hostilities.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 215 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 225 (similar).

See also *Halilović*, (Trial Chamber), November 16, 2005, para. 23: “The application of Article 3 of the Statute presupposes the existence of an armed conflict and a nexus between the alleged crime and the armed conflict. Moreover, four additional

conditions must be fulfilled for a crime to be prosecuted under Article 3 of the Statute. These conditions are generally known as the *Tadić* conditions.”⁹⁶

See also *Stakić*, (Trial Chamber), July 31, 2003, paras. 579, 581: “[There are] two requirements for the applicability of Article 3: the existence of an armed conflict and a nexus between the acts of the accused and that conflict.” “The last element under Article 3 [at least regarding violations that are covered by Common Article 3 to the Geneva Conventions] is that the victim must have been taking no active part in the hostilities at the time the crime was committed.”

See also “added element for Common Article 3 crimes: must be committed against persons taking no active part in the hostilities,” Section (II)(c)(iii), ICTY Digest.

i) there must have been armed conflict, whether internal or international (element 1)

Tadić, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 137: “[U]nder Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 83: “In order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute . . . [t]here must be an armed conflict, whether international or internal . . .” See also *Limaj, et al.*, (Trial Chamber), November 30, 2005, para. 92 (“[T]he nature of the armed conflict is irrelevant to the application of Article 3 of the Statute.”); *Strugar*, (Trial Chamber), January 31, 2005, para. 216 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 536 (“It is immaterial whether th[e] [armed] conflict is internal or international”); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 127 (same as *Blagojević*); *Stakić*, (Trial Chamber), July 31, 2003, para. 566 (same as *Blagojević*); *Blaskić*, (Trial Chamber), March 3, 2000, para. 161 (“Article 3 of the Statute applies to both internal and international conflicts.”); *Furundžija*, (Trial Chamber), December 10, 1998, para. 258 (“the nature of this armed conflict is irrelevant”).

Halilović, (Trial Chamber), November 16, 2005, para. 25: “When an accused is charged with violation of Article 3 of the Statute, based on a violation of Common Article 3, it is

⁹⁶ For discussion of the four “Tadic conditions,” see “conditions for determining which violations fall within Article 3 (the ‘four Tadic conditions’),” Section (II)(b)(ii), ICTY Digest.

immaterial whether the armed conflict was international or non-international in nature. Common Article 3 requires the warring parties to abide by certain fundamental humanitarian standards by ensuring ‘the application of the rules of humanity which are recognized as essential by civilized nations.’ . . . The provisions of Common Article 3 and the universal and regional human rights instruments share a common ‘core’ of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted.”

(1) armed conflict defined: assess the intensity of the conflict and the organization of the parties

Limaj et al., (Trial Chamber), November 30, 2005, para. 84: “The test for determining the existence of an armed conflict was set out in the *Tadic* Jurisdiction Decision and has been applied consistently by the Tribunal since:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

Under this test, in establishing the existence of an armed conflict of an internal character the Chamber must assess two criteria: (i) the intensity of the conflict and (ii) the organisation of the parties.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 536 (using *Tadic* definition); *Hakilovic*, (Trial Chamber), November 16, 2005, para. 24 (same definition); *Galic*, (Trial Chamber), December 5, 2003, para. 9 (same definition); *Stakic*, (Trial Chamber), July 31, 2003, para. 568 (same definition).

See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 87: “The Chamber is also conscious of Article 8 of the Statute of the International Criminal Court (ICC) which, *inter alia*, defines, for its purposes, war crimes committed in an armed conflict not of an international character. Article 8, paragraph 2(f) of the ICC Statute adopts a test similar to the test formulated in the *Tadic* Decision on Jurisdiction. It defines an internal armed conflict by the same two characteristics, ‘protracted armed conflict’ and ‘organised armed groups,’ without including further conditions.”

(a) assessment must be done on a case-by-case basis

Limaj et al., (Trial Chamber), November 30, 2005, para. 90: “Consistently with decisions of other Chambers of this Tribunal and of the ICTR, the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis.”

(b) assessing intensity of the conflict

Limaj et al., (Trial Chamber), November 30, 2005, para. 90: “[I]n assessing the intensity of a conflict, other Chambers have considered factors such as the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 89: “A study by the [International Committee of the Red Cross] submitted as a reference document to the Preparatory Commission for the establishment of the elements of crimes for the [International Criminal Court] noted that:

[in determining whether there is a non-international armed conflict] there must be the opposition of armed forces and *a certain intensity of the fighting*.”
(emphasis in original)

(c) assessing organization of the parties

Limaj et al., (Trial Chamber), November 30, 2005, paras. 90, 89: “With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.”

“[S]ome degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute. This position is consistent with other persuasive commentaries on the matter. A study by the [International Committee of the Red Cross] submitted as a reference document to the Preparatory Commission for the establishment of the elements of crimes for the [International Criminal Court] noted that:

The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria; the term ‘armed conflict’ presupposes the existence of hostilities between armed forces *organised to a greater or lesser extent . . .*”
(emphasis in original)

**(d) banditry, unorganized and short-lived insurrections, or
terrorist activities excluded**

Limaj et al., (Trial Chamber), November 30, 2005, para. 89: “The two determinative elements of an armed conflict, intensity of the conflict and level of organisation of the parties, are used *‘solely for the purpose*, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” (emphasis in original) See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 84 (similar).

See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 87: “As in the Tribunal’s jurisprudence, Article 8(2)(d) of the [International Criminal Court] Statute further clarifies that the . . . Statute does not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.’”

(e) additional objectives irrelevant

Limaj et al., (Trial Chamber), November 30, 2005, para. 170: “[T]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.”

(i) application—additional objectives irrelevant

Limaj et al., (Trial Chamber), November 30, 2005, para. 170: “[T]he Defence submit that the strength of the Serbian forces does not indicate that their purpose was to defeat the [Kosovo Liberation Army], but to ethnically cleanse Kosovo. While it is true that civilians were driven out of their homes and forced to leave Kosovo as a result of military operations, the evidence discloses this to be true for both sides. Undoubtedly civilians fled as their homes and villages were ravaged and in some cases armed units of both sides set about ensuring this. It is not apparent to the Chamber, however, that the immediate purpose of the military apparatus of each side during the relevant period, was not directed to the defeat of the opposing party, even if some further or ultimate objective may also have existed. The two forces were substantially engaged in their mutual military struggle”

(2) application—armed conflict

**(a) armed conflict in Kosovo between Serbian forces and the
Kosovo Liberation Army**

Limaj et al., (Trial Chamber), November 30, 2005, paras. 171-173: “The Chamber is satisfied that before the end of May 1998 an armed conflict existed in Kosovo between

the Serbian forces and the KLA [Kosovo Liberation Army]. By that time the KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in the process of being formed, and issued public statements on behalf of the organisation. Unit commanders gave combat orders and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police, as well as to recruit, train and equip new members. Although generally inferior to the . . . equipment [of the Army of Yugoslavia (‘VJ’) and the Serbian Ministry of Internal Affairs (‘MUP’), *i.e.* the police], the KLA soldiers had weapons, which included artillery mortars and rocket launchers. By July 1998 the KLA had gained acceptance as a necessary and valid participant in negotiations with international governments and bodies to determine a solution for the Kosovo’s crisis, and to lay down conditions in these negotiations for refraining from military action.” “Further, by the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces in areas from the Kosovo-Albanian border in the west, to near Prishtina/Pristina in the east, to Prizren/Prizren and the Kosovo-Macedonian border in the south and the municipality of Mitrovica/Kosovka Mitrovica in the north. The ability of the KLA to engage in such varied operations is a further indicator of its level of organisation. Heavily armed special forces of the Serbian MUP and VJ forces were committed to the conflict on the Serbian side and their efforts were directed to the control and quelling of the KLA forces. Civilians, both Serbian and Kosovo Albanian, had been forced by the military actions to leave their homes, villages and towns and the number of casualties was growing.” “In view of the above the Chamber is persuaded and finds that an internal armed conflict existed in Kosovo before the end of May 1998. This continued until long after 26 July 1998.”

See also Limaj et al., (Trial Chamber), November 30, 2005, para. 93: “The Indictment alleges that an armed conflict between Serbian forces and the [Kosovo Liberation Army] existed in Kosovo not later than early 1998. The Chamber heard evidence and is satisfied that the Serbian forces involved in Kosovo in 1998 included substantial forces of the Army of Yugoslavia (‘VJ’) and the Serbian Ministry of Internal Affairs (‘MUP’), *i.e.* the police, and, therefore, constitute ‘governmental authorities’ within the meaning of the *Tadic* test.”⁷

⁷ The court is looking at the “governmental authorities” test in order to determine whether armed conflict exists. “The test for determining the existence of an armed conflict was set out in the *Tadic* Jurisdiction Decision and has been applied consistently by the Tribunal since:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 84. The question evaluated in *Tadic* is whether the Army of Yugoslavia (VJ) and the Serbian Ministry of Internal Affairs (the police) constitute “governmental

For factual findings showing that before the end of May 1998 the Kosovo Liberation Army sufficiently possessed the characteristics of an organised armed group able to engage in an internal armed conflict, see *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 94-134. For factual findings discussing the intensity of the Kosovo Liberation Army/Serb conflict, see *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 135-167.

**(b) armed conflict in Bosnia and Herzegovina between its
armed forces and Republika Srpska**

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 549: “It has not been disputed that an armed conflict existed between the Republic of Bosnia and Herzegovina and its forces, and the Republika Srpska and its forces during the period relevant for the Indictment. Nor has it been disputed that this armed conflict existed in eastern Bosnia. Based on the evidence set out above in the Factual Background relevant to this case, the Trial Chamber finds that there is sufficient evidence to establish that there was an armed conflict in eastern Bosnia between 11 July and 1 November 1995.”

Galic, (Trial Chamber), December 5, 2003, para. 595: “In the present instance, it is not disputed that a state of armed conflict existed between Bosnia-Herzegovina and its armed forces on the one hand, and the Republika Srpska and its armed forces, on the other. There is no doubt, from a reading of the factual part of this Judgement, that all the criminal acts described therein occurred not only within the framework of, but in close relation to, that conflict.”

Stakić, (Trial Chamber), July 31, 2003, paras. 571-574: “The Trial Chamber is satisfied that an armed conflict existed in the territory of the Municipality of Prijedor between 30 April and 30 September 1992.” “Firstly, the military expert for the Defence stated that, in his expert opinion, there was a state of armed conflict in the Prijedor municipality between April and September 1992. Ewan Brown, the military expert for the Prosecution, indicated that, after the attacks on Hambarine and Kozarac, combat operations were ongoing in the Municipality of Prijedor throughout the summer of 1992.” “In addition, the regular combat reports from the 1st Krajina Corps Command to the 5th Corps Command provide ample evidence that combat operations were ongoing in the Prijedor municipality during the Indictment period.” “Finally, the fact

authorities.” See *Tadić*, (Appeals Chamber), December 2, 1995, para. 70; see also *Tadić*, (Trial Chamber), May 7, 1997, paras. 561-571.

that 'Kozarski Vjesnik' referred to its publications over this period as the 'War Edition' supports the fact that combat operations were ongoing."

For factual findings that there was an armed conflict between April 1, 1992 and December 31, 1992 in the Autonomous Region of Krajina between the Bosnian Government forces and the Bosnian Serb forces, see *Brđjanin*, (Trial Chamber), September 1, 2004, paras. 140-142.

**(c) armed conflict involving Croatian armed forces and the
JNA (Yugoslav Peoples' Army)**

Strugar, (Trial Chamber), January 31, 2005, para. 217: "[T]he evidence establishes that there was an armed conflict between the JNA [Yugoslav Peoples' Army] and the Croatian armed forces throughout the period of the Indictment. These were each forces of governmental authorities, whether of different States or within the one State need not be determined."

**ii) there must be a nexus between the armed conflict and alleged
offense (element 2)**

Limaj et al., (Trial Chamber), November 30, 2005, para. 91: "[T]o meet the jurisdictional preconditions of Article 3 of the Statute, the Prosecution must establish not only the existence of an armed conflict but also a sufficient link between the alleged acts of the accused and the armed conflict. . . ."

Halilović, (Trial Chamber), November 16, 2005, para. 28: "The Trial Chamber notes that the Appeals Chamber considered this matter [the connection between the acts of the accused and the armed conflict] in *Tadić* and held that the required nexus should be established between the alleged crime and the armed conflict."

(1) the acts of the accused must be closely related to the hostilities

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 536: "As to the precise nature of the nexus, when the crime alleged has not occurred at a time and place in which fighting was actually taking place, the Appeals Chamber has held that '[i]t would be sufficient [...] that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.'" *See also Halilović*, (Trial Chamber), November 16, 2005, para. 29 (same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 128: "A close nexus must exist between the alleged offence and the armed conflict. This is satisfied when the alleged crimes are 'closely related to the hostilities.'"

Stakić, (Trial Chamber), July 31, 2003, para. 569: “As regards Article 3, the Prosecution must . . . establish a link between the acts of the accused alleged to constitute a violation of the laws or customs of war and the armed conflict in question. As to the precise nature of this nexus, the Appeals Chamber has held that ‘it would be sufficient [...] that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.’ In other words, it is sufficient to establish that the perpetrator acted in furtherance of or under the guise of the armed conflict.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 32: “[I]n order for a particular crime to qualify as a violation of international humanitarian law under Articles 2 and 3 of the Statute, the Prosecution must . . . establish a sufficient link between that crime and the armed conflict.” “It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”

See also “there must be a nexus between the conflict and crimes alleged” under Article 2, Section (I)(b)(ii), ICTY Digest.

(2) factors for assessing nexus

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 59: “In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account . . . the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 91 (same factors); *Stakić*, (Trial Chamber), July 31, 2003, para. 569 (same factors).

(3) the armed conflict need not be causally linked to the crimes, but it must have played a substantial role in the perpetrator’s ability to commit the crimes, his decision to commit them, the manner in which they were committed or the purpose for which they were committed

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 58: “The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or

the purpose for which it was committed.” See also *Halilović*, (Trial Chamber), November 16, 2005, paras 29, 726; (same test); *Strugar*, (Trial Chamber), January 31, 2005, para. 215 (same test).

Limaj et al., (Trial Chamber), November 30, 2005, para. 91: “The armed conflict need not have been causal to the commission of the crime charged, but it must have played a substantial part in the perpetrator’s ability to commit that crime.”

See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 536: “Such a [nexus] exists as long as the crime is ‘shaped by or dependent upon the environment – the armed conflict – in which it is committed.’”

(4) crimes may be temporally and geographically remote from actual fighting/ international humanitarian law applies in the whole territory, whether or not actual combat takes place there

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 57: “There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. [T]he requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.”

Halilović, (Trial Chamber), November 16, 2005, para. 26: “The Appeals Chamber in the *Tadić* case held that until a general conclusion of peace or a peaceful settlement is reached, international humanitarian law continues to apply ‘in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat takes place there.*’” (emphasis in original) See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 84 (similar).

Prosecutor v. Vasiljević, Case No. IT-98-32-T (Trial Chamber), November 29, 2002, para. 25: “The requirement that the acts of the accused be closely related to the armed conflict does not require that the offence be committed whilst fighting is actually taking place, or at the scene of combat.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 32: “[T]he Appeals Chamber has held that: ‘Even if substantial clashes were not occurring in the [specific

region] at the time and place the crimes were allegedly committed . . . international humanitarian law applies.”

(5) to establish nexus, crime need not have been planned or supported by a policy

Halilović, (Trial Chamber), November 16, 2005, para. 724: “The Trial Chamber recalls that for the existence of the required nexus, the crimes need not have been planned or supported by some form of policy.” *See also Halilović*, (Trial Chamber), November 16, 2005, para. 29 (same test).

(6) single act may constitute violation if the required nexus is established

Halilović, (Trial Chamber), November 16, 2005, para. 724: “[T]here is no reason why a single, isolated act, could not constitute a violation of the law and customs of war, when the required nexus has been established.”

(7) application—nexus

Prosecutor v. Vasićević, Case No. IT-98-32-A (Appeals Chamber), February 25, 2004, paras. 25-27: “The Appellant argues that, although he agrees that there was an armed conflict in the municipality of Visegrad [in south-eastern Bosnia and Herzegovina] at all times relevant to the Indictment, his acts were not closely related to it.” “Paragraph 57 of the Judgement states that:

the acts of the Accused were closely related to the armed conflict. Although he did not take part in any fighting, the Accused was closely associated with Serb paramilitaries, his acts were all committed in furtherance of the armed conflict, and he acted under the guise of the armed conflict.

“The Appeals Chamber finds that the Appellant has not demonstrated that no reasonable trier of fact could have made this finding The Appellant does not dispute that the acts of the Milan Lukic group [a Serb para-military group, with a reputation for being particularly violent, led by Milan Lukic] were connected to the conflict. In fact, the acts for which the Appellant has been convicted were carried out while he was together with the Milan Lukic group. The Appeals Chamber is of the view that the Appellant was associated with the Milan Lukic group on that occasion and that this establishes a sufficient nexus between the Appellant’s acts and the armed conflict.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 174: “[T]he Chamber is satisfied that the requisite nexus between the conduct alleged in the Indictment and the armed conflict has been established. In particular, the Chamber refers to its findings that the [Llapushnik/Lapusnik] prison camp where the alleged crimes occurred was established

after the KLA [Kosovo Liberation Army] took control of the village of Llapushnik/Lapusnik, that it was run by KLA members, and that the camp effectively ceased to exist after the KLA lost control of the Llapushnik/Lapusnik gorge. Those detained in it were principally, if not solely, those who were or who were suspected of being Serbians or Kosovo Albanians who collaborated with the Serbian authorities.”

Halilovic, (Trial Chamber), November 16, 2005, para. 727: “As for the crimes committed in Grabovica [in Bosnia and Herzegovina], the Trial Chambers finds the fact that the ABiH [Army of the Republic of Bosnia and Herzegovina] soldiers were billeted in Grabovica in preparation of combat operations in Herzegovina, has played a substantial part in the soldiers’ ability to commit the crimes. As for the events of Uzdol [near Prozor, in Southern Herzegovina], the Trial Chamber finds that the crimes were committed during an attack on Uzdol, which attack was part of military combat operations. The required nexus is therefore clearly established with regard to both Grabovica and Uzdol.”

Strugar, (Trial Chamber), January 31, 2005, para. 217: “The offences alleged in the Indictment all relate to the shelling of the Old Town of Dubrovnik [Croatia], which was a significant part of this armed conflict [between the Yugoslav Peoples’ Army and the Croatian armed forces]. It follows that the acts with which the Accused is charged were committed during an armed conflict and were closely related to that conflict.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 549: “Based on all the evidence in this case, the Trial Chamber . . . finds that the underlying crimes with which the Indictment is concerned were closely related to the armed conflict. The acts with which the Accused are charged were committed as a result of the hostilities.”

Brljanin, (Trial Chamber), September 1, 2004, paras. 141-142: “The Chamber is satisfied beyond reasonable doubt that the crimes with which the Accused is charged were committed in the course of the armed conflict in the ARK [Autonomous Region of Krajina]. Although the Accused did not take part in any fighting, his acts were closely related to the conflict. Indeed, the Accused was a prominent member of the SDS [Serbian Democratic Party of Bosnia and Herzegovina] and later also President of the ARK Crisis Staff, a regional body vested with both executive and legislative powers within the ARK where the armed conflict was taking place. Its effective powers extended to the municipal authorities of the ARK and the police and its influence encompassed the army and paramilitary organisations. In the following Chapter of this judgement, the Trial Chamber will establish the ARK Crisis Staff’s involvement in the implementation of the Strategic Plan. The Trial Chamber will later establish that, after the ARK Crisis Staff was abolished and throughout the period relevant to the Indictment, the Accused continued to wield great power and acted in various positions

at the republican level in the course of the armed conflict.” “The Trial Chamber is thus satisfied that the general requirements common to Articles 2 and 3 of the Statute are fulfilled.”

Stakic, (Trial Chamber), July 31, 2003, paras. 575-576: “The Trial Chamber is . . . satisfied that there was a nexus between this armed conflict and the acts of the Accused. This can be established through both objective and subjective elements.” “There is evidence that the Crisis Staff, of which Dr. Milomir Stakic was President, issued the ultimatum to the residents of Hambarine [in the municipality of Prijedor] that they should surrender their weapons or suffer the consequences. An SJB [Public Security Station] report states that it was the Crisis Staff which decided to intervene militarily in the village of Hambarine [also in the municipality of Prijedor]. Moreover, in an interview, Dr. Milomir Stakic, speaking in his capacity as President of the Crisis Staff, stated in relation to the attack on the town of Kozarac: ‘[A]ctually *we* made a decision that the army and the police go up there [...]’. Throughout the armed conflict, there is evidence that Dr. Milomir Stakic maintained close contacts with the military.”

iii) added element for Common Article 3 crimes: must be committed against persons taking no active part in the hostilities

Limaj et al., (Trial Chamber), November 30, 2005, para. 176: “[A]s Common Article 3 protects persons taking no active part in the hostilities, the victims of the alleged violation must have taken no active part in the hostilities at the time the crime was committed.”

Halilovic, (Trial Chamber), November 16, 2005, para. 32: “For the application of any Article 3 charge based on Common Article 3, the Prosecution must also prove that the victim was a person taking no active part in the hostilities at the time the crime was committed.” *See also Halilovic*, (Trial Chamber), November 16, 2005, para. 36 (similar).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 540: “A last requirement for the application of any Article 3 charge based on Common Article 3 is that the victim must have taken no active part in the hostilities at the time the crime was committed.” *See also Stakic*, (Trial Chamber), July 31, 2003, para. 581 (similar); *Kivucka et al.*, (Trial Chamber), November 2, 2001, para. 124 (similar).

(1) assessing protected status

Halilovic, (Trial Chamber), November 16, 2005, paras. 33-34: “In the *Tadic* case, the test applied by the Trial Chamber was to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, ‘being those hostilities in the context of which the alleged offences are said to have been committed.’

The Trial Chamber in *Tadić* held that ‘it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in the hostilities at the relevant time.’”

“The Trial Chamber finds that it is the specific situation of the victim at the moment the crime was committed that must be taken into account in determining his or her protection under Common Article 3. The Trial Chamber considers that relevant factors in this respect include the activity, whether or not the victim was carrying weapons, clothing, age and gender of the victims at the time of the crime. While membership of the armed forces can be a strong indication that the victim is directly participating in the hostilities, it is not an indicator which in and of itself is sufficient to establish this. Whether a person did or did not enjoy protection of Common Article 3 has to be determined on a case-by-case basis.”

Blaskić, (Trial Chamber), March 3, 2000, para. 180: “Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.”

Jelić, (Trial Chamber), December 14, 1999, para. 34: “Common Article 3 protects ‘[p]ersons taking no active part in the hostilities’ including persons ‘placed *hors de combat* by sickness, wounds, detention, or any other cause.’ Victims of murder, bodily harm and theft, all placed *hors de combat* by their detention, are clearly protected persons within the meaning of common Article 3.”

(2) application—victims taking no active part in hostilities

Stakić, (Trial Chamber), July 31, 2003, para. 589: “The Trial Chamber is convinced that the vast majority of the victims of the [] crimes were taking no active part in the hostilities at the time the crimes were committed. In particular, the Trial Chamber finds that those held in the Omarska, Keraterm and Trnopolje camps are automatically to be considered *hors de combat* by virtue of their being held in detention. The same applies to those victims who were displaced in the many convoys that were organised and those innocent civilians who were killed during indiscriminate armed attacks on civilian settlements, throughout the Municipality of Prijedor during the Indictment period. In relation to the women and children who were the victims of these crimes, there is no evidence at all to suggest that they participated in combat activities.”

iv) *mens rea*

(1) generally

See discussion of mental state (*mens rea*) in underlying offenses, Section (II)(d)(i)(5) (torture); (II)(d)(ii)(5) (rape); (II)(d)(iii)(5) (cruel treatment); (II)(d)(iv)(7) (murder); (II)(d)(v) (violence to life and person); (II)(d)(vi)(5) (outrages upon personal dignity); (II)(d)(viii)(7) (wanton destruction of cities, towns or villages, or devastation not justified by military necessity); (II)(d)(x)(6) (seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science); (II)(d)(xi)(11) (unlawful attack on civilians and civilian objects); (II)(d)(xiv)(1) (slavery); (II)(d)(xv)(5) (terror against the civilian population), ICTY Digest.

(2) discriminatory intent or motive not required

Aleksovski, (Appeals Chamber), March 24, 2000, para. 20: “There is nothing in the undoubtedly grave nature of the crimes falling within Article 3 of the Statute, nor in the Statute generally, which leads to a conclusion that those offences are punishable only if they are committed with discriminatory intent. The general requirements which must be met for prosecution of offences under Article 3 . . . do not include a requirement of proof of a discriminatory intent or motivation.”

(3) distinguish intent from motive

Krnjelac, (Appeals Chamber), September 17, 2003, para. 102: “The Appeals Chamber . . . recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out ‘the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.’ It is the Appeals Chamber’s belief that this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.” (emphasis added) See also *Jelisić*, (Appeals Chamber), July 5, 2001, para. 49 (same quoted language).

d) Underlying offenses

i) torture

(1) defined

Prosecutor v. Kvocka, et al., Case No. IT-98-30/1-A (Appeals Chamber), February 28, 2005, para. 289: “The crime of torture was defined by the Trial Chamber as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.” *See also Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Appeals Chamber), July 21, 2000, para. 111 (same and requiring that the torture “be linked to an armed conflict. . . .”)⁸

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: The definition of torture has the following elements: “(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.” *See also Krnojelac*, (Trial Chamber), March 15, 2002, para. 179 (using “deliberate” instead of “intentional” in part (iii)).

Limaj et al., (Trial Chamber), November 30, 2005, para. 235: “The law on torture is well settled by the jurisprudence of the Tribunal. For the crime of torture to be established, whether as a war crime or as a crime against humanity, the following three elements must be met:

- (1) There must be an act or omission inflicting severe pain or suffering, whether physical or mental;
- (2) The act or omission must be intentional; and
- (3) The act or omission must have been carried out with a specific purpose such as to obtain information or a confession, to punish, intimidate or coerce the

⁸ *Furundzija* goes on to require a fifth element that “at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g., as a *de facto* organ of a State or any other authority-wielding entity.” However, more recent decisions suggest that this is not a requirement. *See* Section (II)(d)(i)(7), ICTY Digest.

victim or a third person, or to discriminate, on any ground, against the victim or a third person.”

(2) same regardless of Article

Limaj et al., (Trial Chamber), November 30, 2005, para. 235: The elements of torture are the same whether it is “a war crime or as a crime against humanity.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 482: “The definition of ‘torture’ remains the same regardless of the Article of the Statute under which the Accused has been charged.”

For discussion of torture as a crime against humanity under Article 5, see Section (IV)(d)(vi), ICTY Digest. For discussion of torture as a grave breach of the Geneva Conventions under Article 2, see Section (I)(d)(ii), ICTY Digest.

(3) the prohibition against torture is *jus cogens*

Farundžija, (Trial Chamber), December 10, 1998, paras. 139, 153: “It . . . seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and - if the requisite conditions are met - qua treaty law, the content of the prohibition being the same.” “Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”

(4) severe pain and suffering must be inflicted (element 1)

Kvočka et al., (Trial Chamber), November 2, 2001, para. 143: “[T]he severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences. A precise threshold for determining what degree of suffering is sufficient to meet the definition of torture has not been delineated.”

See *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 289 (torture requires, *inter alia*, infliction of “severe pain or suffering”); *Kunarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 142 (same); *Farundžija*, (Appeals Chamber), July 21, 2000, para. 111 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 235 (same).

(a) assessing the severity of the torture

Limaj et al., (Trial Chamber), November 30, 2005, para. 237: “With respect to the assessment of the seriousness of the acts charged as torture, previous jurisprudence of the Tribunal has held that this should take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and the method used and the position of inferiority of the victim. Also relevant to the Chamber’s assessment is the physical or mental effect of the treatment on the victim, the victim’s age, sex, or state of health. Further, if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole. Finally, this Chamber concurs with the finding of the *Celebić* [a/k/a *Delalić*] Trial Chamber, made specifically in the context of rape, that in certain circumstances the suffering can be exacerbated by social and cultural conditions and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 182: “When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 143: “In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim’s age, sex, or state of health will also be relevant in assessing the gravity of the harm.”

(b) permanent injury not required

Limaj et al., (Trial Chamber), November 30, 2005, para. 236: “[I]t is not required that the act or omission has caused a permanent injury”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 148: “[T]orture practices often cause permanent damage to the health of the victims, [but] permanent injury is not a requirement for torture.”

(c) mental suffering can qualify

Limaj et al., (Trial Chamber), November 30, 2005, para. 236: “[T]here [is no] requirement that the act or omission . . . caused a physical injury, as mental harm is a prevalent form of inflicting torture.”

Krocka et al., (Trial Chamber), November 2, 2001, para. 149: “Damage to physical or mental health will be taken into account in assessing the gravity of the harm inflicted. [A]buse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. [B]eing forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”

(d) act or omission as torture

Limaj et al., (Trial Chamber), November 30, 2005, para. 236: “An act or omission may constitute the *actus reus* of torture if it has caused severe pain or suffering.” *See also* *Krocka, et al.*, (Appeals Chamber), February 28, 2005, para. 289 (the crime of torture may be committed by “act or omission”); *Kunarac, Kovac, and Vokovic*, (Appeals Chamber), June 12, 2002, para. 142 (same); *Furundzija*, (Appeals Chamber), July 21, 2000, para. 111 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 235 (same).

(e) mistreatment less severe than torture may constitute another offense

Limaj et al., (Trial Chamber), November 30, 2005, para. 236: “Mistreatment which does not rise to this level of severity may nevertheless constitute another offence under the jurisdiction of the Tribunal.”

(5) *mens rea*: the act or omission must be intentional (element 2)

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: As to mental state: “The act or omission must be intentional.” *See also* *Krnjelic*, (Trial Chamber), March 15, 2002, para. 179 (using “deliberate” instead of “intentional”).

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 153: The Appeals Chamber explained the distinction between “intent” and “motivation.” The Appeals Chamber held that “even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the

definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 238: “As for the *mens rea* required for the crime of torture, the previous jurisprudence of the Tribunal establishes that direct intent is required: the perpetrator must have intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims. It is irrelevant that the perpetrator may have had a different motivation, if he acted with the requisite intent.”

(6) prohibited purpose or goal required (element 3)

Kvočka, et al., (Appeals Chamber), February 28, 2005, para. 289: Torture must have been carried out “for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.”; *Kunarac, Kovac, and Vokotić*, (Appeals Chamber), June 12, 2002, para. 142 (similar); *Furundžija*, (Appeals Chamber), July 21, 2000, para. 111 (same).

Limaj et al., (Trial Chamber), November 30, 2005, para. 239: “For the crime of torture to be established, the alleged act or omission must have been carried out with a specific purpose: to obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 180: “‘Torture’ constitutes one of the most serious attacks upon a person’s mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment. Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 188: “The infliction of severe pain in pursuance of a given prohibited purpose must be established beyond reasonable doubt”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 140: “[T]he prohibited purposes listed in the Torture Convention as reflected by customary international law ‘do not constitute an exhaustive list, and should be regarded as merely representative.’”

“[H]umiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law.”

(a) prohibited purpose need not be predominating or sole purpose

Kumarac, Kovac, and Vukovic, (Appeals Chamber), June 12, 2002, para. 155: “[A]cts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 239: “The prohibited purpose needs not be the sole or the main purpose of the act or omission in question.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 153 (similar).

Prosecutor v. Kumarac, Kovac, and Vukovic, Case No. IT-96-23 and IT-96-23/11 (Trial Chamber), February 22, 2001, para. 486: “There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. [T]he prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”

(7) perpetrator need not have acted in an official capacity

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 284: “In [the *Kumarac* Appeal Judgement], the Appeals Chamber concluded that the *Kumarac* Trial Chamber was correct to take the position that the public official requirement was not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. The Appeals Chamber in the present case reaffirms that conclusion. As a result, the Appeals Chamber finds that Kvočka’s argument that he could not be found guilty of torture for acts perpetrated by Zigic and Knezevic on the ground that they were not public officials is bound to fail, regardless of the precise status of these two individuals.”

Kumarac, Kovac, and Vukovic, (Appeals Chamber), June 12, 2002, para. 148: “[T]he public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 240: “[T]he Chamber notes that while the earlier jurisprudence of the Tribunal has reached different conclusions as to whether, for the crime of torture to be established, the alleged act or omission must be committed by, or at the instigation of or with the consent or acquiescence of an official

or person acting in an official capacity, this issue is now settled by the Appeals Chamber. Under customary international law and the jurisprudence of the Tribunal it is not necessary that the perpetrator has acted in an official capacity.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 188: “Under international humanitarian law in general, and under Articles 3 and 5 of the Statute in particular, the presence or involvement of a state official or of any other authority-wielding person in the process of torture is not necessary for the offence to be regarded as ‘torture.’”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 139: “[T]he state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.”

But see Furundžija, (Appeals Chamber), July 21, 2000, para. 111: The fifth element of the crime of torture in a situation of armed conflict is “at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity.”

But see Prosecutor v. Delalić et al., Case No. IT-96-21, (Trial Chamber), November 16, 1998, para. 494: Torture requires the act or omission to be “committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”

(8) examples of acts constituting torture

Kvočka et al., (Trial Chamber), November 2, 2001, para. 144: “Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts *per se* constituting torture.”

(a) rape and other forms of sexual violence as torture

Kumarac, Kovac, and Vokosic, (Appeals Chamber), June 12, 2002, paras. 150-151: “[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is . . . such an act. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.” “Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”

Krocka et al., (Trial Chamber), November 2, 2001, para. 145: “[R]ape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.”

Furundžija, (Trial Chamber), December 10, 1998, paras. 163-164: “Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture.” “Depending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture.”

Delalić et al., (Trial Chamber), November 16, 1998, paras. 496, 495: The Trial Chamber held that “whenever rape and other forms of sexual violence meet the [following] criteria, then they shall constitute torture.” “The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. [I]t is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. [I]his is inherent in situations of armed conflict.”⁹

(9) application—torture

Limaj et al., (Trial Chamber), November 30, 2005, para. 658: “In the other case of mistreatment of [witness] L12 established earlier in this decision, L12 was beaten in a barn [in the Llapushni/Lapusnik prison camp in central Kosovo]. Haradin Bala blindfolded L12 and brought him to a barn, where the beating took place. L12 testified that Shala [Haradin Bala] was present during the incident. The Chamber accepts L12’s evidence, however, that Haradin Bala’s involvement in the incident was limited to bringing L12 to the perpetrators and being present while the beating was taking place. The Chamber finds that by bringing L12 to the barn and being present throughout the beating by others, Haradin Bala did contribute to the commission of the crime substantially enough to regard his participation as aiding the offence committed by the direct perpetrators. In the circumstances, Haradin Bala must have become aware, at least at the time of the beating, that the assailants were committing a crime and of their

⁹ As to whether the involvement of a public official is required, see Section (II)(d)(i)(7), ICTY Digest.

state of mind. Accordingly, he possessed the *mens rea* required for aiding and abetting. As established earlier, this incident constitutes the elements of both cruel treatment and torture.”

See also discussion of torture under Article 5, Section (IV)(d)(vi), ICTY Digest, and under Article 2, Section (I)(d)(ii)(1), ICTY Digest.

ii) rape

(1) defined

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 395: “The Trial Chamber relied on the definition of rape as given in the *Kumarac et al.* Trial Judgement, which reads as follows:

In light of the above considerations, the Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.

This definition was confirmed by the Appeals Chamber [in *Kumarac*], which added that the ‘assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.’” See also *Kunarac, Kovac, and Vokotić*, (Appeals Chamber), June 12, 2002, paras. 127-128 (same quoted language).

(2) prohibition on rape in armed conflicts long recognized under treaty and customary international law

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 395: “[T]he prohibition of rape in armed conflicts has been long recognized in international treaty law as well as in customary international law.”

(3) status of detention normally vitiates consent

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 396: “The Trial Chamber determined that ‘in cases of sexual assault a status of detention will normally vitiate consent in such circumstances.’ This is consistent with the jurisprudence of the Tribunal”

See also *Kunarac, Kovac, and Vokovic*, (Appeals Chamber), June 12, 2002, para. 132: “[T]here are ‘factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.’ A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”

(4) resistance by victim and force by perpetrator not required

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, paras. 128-129: “Resistance” is not a requirement. “Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.”

(5) *mens rea*

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 127: The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”

See also discussion of rape as crime against humanity under Article 5, Section (IV)(d)(vii), ICTY Digest, and rape underlying persecution as a crime against humanity under Article 5, Section (IV)(d)(viii)(3)(f), ICTY Digest.

iii) cruel treatment

(1) defined

Blaskic, (Appeals Chamber), July 29, 2004, para. 595: “The Appeals Chamber has defined ‘cruel treatment’ as follows:

- Cruel treatment as a violation of the laws or customs of war is
 - a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,
 - b. committed against a person taking no active part in the hostilities.”

See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 231 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 261 (similar).

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 265: “[T]he *Celebici* [a/k/a *Delalic*] Trial Chamber found that: cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”

Blaskić, (Trial Chamber), March 3, 2000, para. 186: “[C]ruel treatment constitutes an intentional act or omission ‘which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.’”

(2) elements same as inhuman treatment

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 246: “[O]ffences of inhuman treatment and cruel treatment are residual clauses under Articles 2 and 3 of the Statute respectively. Materially, the elements of these offences are the same.” “The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of ‘wilfully causing great suffering or serious injury to body or health.’”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 265: “[C]ruel treatment’ is ‘equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.’”

Blaskić, (Trial Chamber), March 3, 2000, para. 186: “[Cruel treatment] carries an equivalent meaning and therefore the same residual function for the purposes of Common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Convention.”

For discussion of inhuman treatment under Article 2, see (I)(d)(ii)(2), ICTY Digest.

(3) mental suffering requirement lower than for torture

Kvočka et al., (Trial Chamber), November 2, 2001, para. 161: “[T]he degree of physical or mental suffering required to prove cruel treatment is lower than the one required for torture, though it must be at the same level as ‘wilfully causing great suffering or serious injury to body or health.’ [T]he degree of suffering required to prove cruel or inhuman treatment was not as high as that required to sustain a charge of torture.”

(4) prohibited purpose not required

Kvočka et al., (Trial Chamber), November 2, 2001, para. 226: “The requirement of a prohibited purpose which is characteristic of the offence of torture, is a materially distinct element that is not required in the offences of cruel treatment.”

(5) mens rea

Limaj et al., (Trial Chamber), November 30, 2005, para. 231: “As regards *mens rea*, the perpetrator must have acted with direct intent to commit cruel treatment or with indirect

intent, *i.e.* in the knowledge that cruel treatment was a probable consequence of his act or omission.”

Strugar, (Trial Chamber), January 31, 2005, para. 261: “[T]he Chamber holds that indirect intent, *i.e.* knowledge that cruel treatment was a probable consequence of the perpetrator’s act or omission, may also fulfil the intent requirement for this crime.”

(6) practices that constitute cruel treatment

(a) use of human shields

Blaskic, (Appeals Chamber), July 29, 2004, paras. 653, 669: “The use of prisoners of war or civilian detainees as human shields is . . . prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively where the other elements of these crimes are met.” “The Appeals Chamber considers that the use of the detainees as human shields caused them serious mental harm and constituted a serious attack on human dignity.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 161: “[T]he use of human shields constitutes cruel treatment under Article 3 of the Statute.”

(i) use of human shields prohibited even where they are not attacked

Blaskic, (Appeals Chamber), July 29, 2004, para. 654: “Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself.”

(b) use of forced labor

Blaskic, (Appeals Chamber), July 29, 2004, para. 597: “The Appeals Chamber has noted that the use of forced labour is not always unlawful. Nevertheless, the treatment of non-combatant detainees may be considered cruel where, together with the other requisite elements, that treatment causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The Appeals Chamber notes that Geneva Conventions III and IV require that when non-combatants are used for forced labour, their labour may not be connected with war operations or have a military character or purpose. The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms

of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment”¹⁰

Blaskic, (Appeals Chamber), July 29, 2004, paras. 590-591: “In the Digest of Laws and Cases of the United Nations War Crimes Commission, the position was quite clearly stated: ‘There is nothing illegal in the mere employment of prisoners of war.’ Causing prisoners of war to perform unhealthy or dangerous work was, however, clearly recognised as a war crime.” “As to the position of civilians in occupied territories, it has been established that putting civilians to forced labour may in certain circumstances be a war crime. Those circumstances include their employment in armament production, and in carrying out military operations against the civilians’ own country.”

(c) prison camp detention conditions

Limaj et al., (Trial Chamber), November 30, 2005, paras. 288-289: “It is apparent from the evidence presented in this trial, and the Chamber finds, that the material conditions of detention in the storage room and the cowshed [at the Llapushnik/Lapusnik prison camp in Kosovo] were appalling. In the Chamber’s view, it clearly emerges from the evidence that food and water were not provided regularly, and that there were no cleaning, washing or sanitary facilities. Both the cowshed and the storage room were not adequately ventilated and at times were overcrowded, especially the storage room. Even though the detainees were allowed outside the storage room once in a while to be able to have some fresh air, the atmosphere and conditions in the room remained deplorable. There were no sleeping facilities either in the storage room or the cowshed, which was exacerbated by overcrowding particularly in the storage room. Detainees in the cowshed were typically chained to the wall or tied to other detainees. No medical care was provided, although readily available.” “[T]he Chamber finds that the deplorable conditions of detention in both the storage room and the cowshed at the Llapushnik/Lapusnik prison camp, were such as to cause serious mental and physical suffering to the detainees, and constituted a serious attack upon the dignity of the detainees. Further, given the extensive period of time over which these conditions were maintained without improvement, the Chamber is satisfied that they were imposed deliberately. In the Chamber’s finding, detention in either the cowshed or the storage room was in conditions which constituted the charged offence of cruel treatment”

¹⁰ The court theorized that it could enter convictions under both Article 2 for inhuman treatment and Article 3 for cruel treatment. The conviction was entered under Article 2 on the grounds that a conviction under Article 2 (via Common Article 3 to the Geneva Conventions) has an additional element not present in Article 3. See *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 634 and 671. For discussion of cumulative convictions, see (IX)(b), ICTY Digest.

For findings as to the role of Haradin Bala in maintaining the conditions of detention at the Llapushnik/Lapushnik prison camp in Kosovo, see *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 652, 670.

(d) shelling of civilian town

For findings that cruel treatment occurred when two civilians in the Old Town of Dubrovnik were seriously injured as a result of shelling of the Old Town by the JNA [Yugoslav Peoples' Army] on December 6, 1991, see *Strugar*, (Trial Chamber), January 31, 2005, paras. 264, 268-272, 275-276.

(e) unlawful seizure, unlawful detention for prolonged periods and interrogation—not cruel treatment

Limaj et al., (Trial Chamber), November 30, 2005, para. 232: “Leaving aside cruel treatment under Count 6 (which relates specifically to the alleged inhumane conditions of detention at the prison camp), cruel treatment under Count 2 has been charged in relation to the ‘unlawful seizure,’ ‘unlawful detention for prolonged periods’ and ‘interrogation’ of Serbian and /or Kosovo Albanian civilians at the Llapushnik/Lapusnik prison camp [in Kosovo]. These acts are charged *per se* as constituting a serious attack on human dignity, and therefore constituting cruel treatment under Article 3 of the Statute. The Chamber is of the view that whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis. The Chamber notes that the offence of cruel treatment has never been established before this Tribunal in relation to these specific acts. In determining whether the ‘unlawful seizure,’ ‘unlawful detention for prolonged periods’ and ‘interrogation’ alleged in the instant case amount to cruel treatment, the Chamber has, therefore, taken into account all the circumstances of the instant case. The Chamber has come to the conclusion that, at least in the circumstances of this case, these acts in and of themselves do not amount to a serious attack on human dignity within the meaning of cruel treatment under Article 3 of this Statute. Count 2 must therefore also be dismissed.” (emphasis in original)

See also discussion of inhuman treatment under Article 2, Section (I)(d)(ii)(2), ICTY Digest. See also cruel and inhumane treatment underlying the crime of persecution under Article 5, Section (IV)(d)(viii)(3)(i), ICTY Digest.

iv) murder

(1) elements

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 261: “[F]or the crime of murder under Article 3 of the Statute to be established, the Prosecutor bears the onus of proving

- 1) the death of a victim taking no active part in the hostilities;
- 2) that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible;
- 3) the intent of the accused or of the person or persons for whom he is criminally responsible
 - a) to kill the victim; or
 - b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.”

See also Halilović, (Trial Chamber), November 16, 2005, para. 35 (same definition).

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 37: “The Appeals Chamber has . . . held that the elements of murder under Article 3 of the Statute are the death of the victim as a result of an act of the accused, committed with the intention to cause death and against a person taking no active part in the hostilities.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 241: “Three elements are required to establish the offence of murder: (a) the death of a victim, although it is not necessary to establish that the body of the deceased person has been recovered; (b) that the death was the result of an act or an omission of the perpetrator; and (c) the intent of the perpetrator at the time of the act or omission to kill the victim or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission.”

Strugar, (Trial Chamber), January 31, 2005, para. 236: “The following formulation appears to reflect the understanding which has gained general acceptance in the jurisprudence of the Tribunal: to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 556: “In the jurisprudence of both the Tribunal and the ICTR, murder has consistently been defined as the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 584 (similar).

Brdjanin, (Trial Chamber), September 1, 2004, para. 381: “Save for some insignificant variations in expressing the constituent elements of the crime of murder and wilful killing, which are irrelevant for this case, the jurisprudence of this Tribunal has consistently defined the essential elements of these offences as follows:

1. The victim is dead;

2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
3. The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
 - to kill, or
 - to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 382: “The *actus reus* consists in the action or omission of the accused resulting in the death of the victim. The Prosecution need only prove beyond reasonable doubt that the accused’s conduct contributed substantially to the death of the victim.”

Prosecutor v. Krstić, Case No. IT-98-33 (Trial Chamber), August 2, 2001, para. 485: “Murder has consistently been defined . . . as the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death.”

Jelisić, (Trial Chamber), December 14, 1999, para. 35: “Murder is defined as homicide committed with the intention to cause death. The legal ingredients of the offence are generally recognised in national law may be characterised as follows: [a] the victim is dead, [b] as a result of an act of the accused, [c] committed with the intention to cause death.”

(2) comparison between murder under Articles 3 and 5 and willful killing under Article 2

Strugar, (Trial Chamber), January 31, 2005, para. 236: “This definition [of murder] would appear to be applicable also to wilful killing and murder under Articles 2 and 5, respectively. In addition, to prove murder under Article 3 of the Statute, it must be shown that the victims were persons taking no active part in the hostilities.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 556: “The elements of the offence of murder as a crime against humanity and as a violation of the laws or customs of war are the same.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 380: “It is clear from the Tribunal’s jurisprudence that the elements of the underlying crime of wilful killing under Article 2

of the Statute are identical to those required for murder under Article 3 and Article 5 of the Statute.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 233: “[T]he elements of the offence of ‘murder’ under Article 3 of the Statute are similar to those which define a ‘wilful killing’ under Article 2 of the Statute, with the exception that under Article 3 of the Statute the offence need not have been directed against a ‘protected person’ but against a person ‘taking no active part in the hostilities.’”

See also *Blaskić*, (Trial Chamber), March 3, 2000, para. 181: “The content of the offence of murder under Article 3 is the same as for wilful killing under Article 2.” See also *Stakić*, (Trial Chamber), July 31, 2003, paras. 585-586 (“murder” should be “equated” with “killing”).

See also discussion of willful killing under Article 2, Section (I)(d)(i), ICTY Digest; murder under Article 5, Section (IV)(d)(i), ICTY Digest; and murder underlying persecution under Article 5, Section (IV)(d)(viii)(3)(g), ICTY Digest.

(3) proof of dead body not required

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 260: “In the *Krnjelac* case, the Trial Chamber rightly stated that proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. The fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible.” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 37 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 385 (similar). See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 241 (“it is not necessary to establish that the body of the deceased person has been recovered . . .”)

Halilović, (Trial Chamber), November 16, 2005, para. 37: “[R]elevant factors [for inferring the victim is dead absent proof of a dead body] include, but are not limited to, the coincident or near-coincident time of death of other victims, the fact that the victims were present in an area where an armed attack was carried out, when, where and the circumstances in which the victim was last seen, and the behaviour of soldiers in the vicinity, as well as towards other civilians, at the relevant time.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 383: “The Trial Chamber concurs with the *Tadić* Trial Chamber that: ‘Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a

body as proof to death. However, there must be evidence to link injuries received to a resulting death.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 326: “Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.”

(4) suicide as murder

Krnjelac, (Trial Chamber), March 15, 2002, para. 329: “The crucial issues [as to whether causing a person to commit suicide can be viewed as murder] are causation and intent. The relevant act or omission by the Accused or by those for whose acts or omissions the Accused bears criminal responsibility must have caused the suicide of the victim and the Accused, or those for whom he bears criminal responsibility, must have intended by that act or omission to cause the suicide of the victim, or have known that the suicide of the victim was a likely and foreseeable result of the act or omission. The Accused cannot be held criminally liable unless the acts or omissions for which he bears criminal responsibility induced the victim to take action which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence of the conduct of the Accused, or of those for whom he bears criminal responsibility.”

(5) willful omission to provide medical care as murder

(a) application—willful omission to provide medical care as murder: the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 270-271: “Having examined the testimony cited by the Trial Chamber, the Appeals Chamber is satisfied that a reasonable trier of fact could conclude that the victim died as a result of deliberate lack of treatment for his chronic ailment. It is therefore reasonable to conclude that Ismet Hodzic, who died [at the Omarska camp] as a result of wilful omission to provide medical care, was murdered.” However, “[t]he Appeals Chamber finds that the evidence is insufficient to establish that the acts or omission that caused Ismet Hodzic’s death occurred during the time that Kvočka was employed in the camp.”

(6) death from cumulative effect of several beatings

(a) application—death from cumulative effect of several beatings: the Keraterm camp in Prijedor

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 532: “The Appeals Chamber understands Zigic’s submission in this ground of appeal to be that the Trial Chamber committed an error of fact, because the factual findings of the Trial Chamber do not support his conviction for the murder of Emsud Bahonjic. In this context, Zigic submits that the Appeals Chamber should apply the standard of the *Celebići* [a/k/a *Delalić*] Appeal Judgement. In *Celebići*, the Trial Chamber had established that there had been two beatings, and that the death of the victim was a result *only* of the second beating, whereas the first beating did not cause his death. The question for the Appeals Chamber arose whether it had been established that the accused had taken part in the second beating. In the present case, the Trial Chamber found that Emsud Bahonjic died [at the Keraterm camp] from the cumulative effects of several beatings, and that Zigic participated in several of these beatings. The factual finding that Emsud Bahonjic died from the cumulative effects of these beatings is adequately supported by the evidence quoted by the Trial Chamber. As a participant in several of these beatings, Zigic is liable as a co-perpetrator [of a joint criminal enterprise] for the death of Emsud Bahonjic.”

(7) *mens rea*

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 261: The *mens rea* for murder requires intent “to kill the victim, or . . . to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 35 (same); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 556 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 584 (similar); *Krstić*, (Trial Chamber), August 2, 2001, para. 485 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 241: The *mens rea* for murder requires “the intent of the perpetrator at the time of the act or omission to kill the victim or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 236 (same).

Strugar, (Trial Chamber), January 31, 2005, paras. 235-236: “The elements of murder as a violation of the laws or customs of war under Article 3 of the Statute have been considered in many decisions of the Tribunal. The issue which has called for most consideration is the mental element, i.e. *mens rea*. It is now settled that the *mens rea* is not confined to cases where the accused has a direct intent to kill or to cause serious bodily harm, but also extends to cases where the accused has what is often referred to as an

indirect intent. While the precise expression of the appropriate indirect intent has varied between decisions, it has been confirmed by the Appeals Chamber [in *Blaskić*] that the awareness of a mere possibility that a crime will occur is not sufficient in the context of ordering under Article 7(1) of the Statute. The knowledge of a higher degree of risk is required. In some cases the description of an indirect intent as *dolus eventualis* may have obscured the issue as this could suggest that *dolus eventualis* as understood and applied in a particular legal system had been adopted as the standard in this Tribunal.”

“[I]t should be stressed that knowledge by the accused that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death. The Chamber notes that this formulation may prove to require amendment so that knowledge that death or serious bodily harm is a probable consequence is sufficient to establish the necessary *mens rea*, but the Chamber need not consider this in the present case; it has not yet received authoritative acceptance.” (emphasis in original)

Stakić, (Trial Chamber), July 31, 2003, para. 587: “Turning to the *mens rea* element of the crime, the Trial Chamber finds that both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3. . . . Thus, if the killing is committed with ‘manifest indifference to the value of human life,’ even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.”

See also *Kordić and Čerkez*, (Appeals Chamber), December 17, 2004, para. 37 (requiring “intention to cause death”); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 381 (requiring intent “to kill” or “to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.”); *Jelić*, (Trial Chamber), December 14, 1999, para. 35 (same as *Kordić*).

(a) awareness that the victims were persons taking no active part in the hostilities

Halilović, (Trial Chamber), November 16, 2005, para. 36: “In relation to the *mens rea*, the Trial Chamber notes that the Trial Chamber in the *Galić* case stated, concerning the crime of attacks on civilians set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, and punishable under Article 3 of the Statute:

[f]or the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in

such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.

The crime of attacks on civilians contains an element in relation to the status of the victims, which is similar to that of the crime of murder presently at issue. . . . The Trial Chamber agrees with the *Galic* Trial Chamber that the Prosecution must show that the perpetrator was aware or should have been aware of this status of the victim. In other words, the *mens rea* of the perpetrator of murder must encompass the fact that the victims were persons taking no active part in the hostilities. The Trial Chamber considers that the factors previously mentioned for determining whether a victim is or is not taking an active part in hostilities are relevant in this respect.”

(b) inferring *mens rea*

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 120, 131: “The Appeals Chamber agrees with the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference [regarding the crime of murder under Article 3], that inference must be the only reasonable inference available on the evidence.” “The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime [here, murder under Article 3], special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.”

(c) *mens rea* regarding murder by artillery attack/shelling

Strugar, (Trial Chamber), January 31, 2005, paras. 238-240: “A review of the Tribunal’s case-law reveals that deaths resulting from shelling have formed the basis for charges of murder or wilful killing in at least two cases to date. In the *Galic* case, the Chamber by majority convicted the accused on Count 5 of the indictment for murder under Article 5 of the Statute for his participation in ‘a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and its civilian population.’ While the *Galic* Chamber did not specify the particular facts which, in its opinion, fulfilled the intent requirement for murder in relation to this charge, a review of the specific shelling incidents upon which the conviction is based reveals that while the Chamber found that certain civilians were deliberately targeted, it also made reference to incidents where civilian deaths resulted from an attack which was ‘indiscriminate as to its target (which nevertheless was primarily if not entirely a residential neighbourhood), and was carried out recklessly, resulting in civilian casualties.’ The impression left is that both situations were taken to constitute murder, although there is no specific consideration of the issue.”

“In the *Kordic* case, wilful killings and murder were charged under Articles 2, 3

and 5 of the Statute, respectively for, *inter alia*, deaths that occurred as a result of attacks on various towns and villages in the area of central Bosnia. The specific facts upon which the Chamber relied in convicting the accused of murder and wilful killing are not clearly identified in the judgement. However, the majority of incidents analysed appear to be ones in which a civilian town or village was attacked with artillery before being overrun by HVO [Croatian Defence Council] soldiers who then carried out individual killings. There is no specific attention to the issue. However civilian deaths resulting from both the initial artillery attack and the subsequent targeted killings appear to have been considered as part of the factual matrix underlying the charges of murder and wilful killing.”

“On the basis of the foregoing analysis, it would seem that the jurisprudence of the Tribunal may have accepted that where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterised as murder, when the perpetrators had knowledge of the probability that the attack would cause death. Whether or not that is so, given the acceptance of an indirect intent as sufficient to establish the necessary *mens rea* for murder and wilful killing, there appears to be no reason in principle why proof of a deliberate artillery attack on a town occupied by a civilian population would not be capable of demonstrating that the perpetrators had knowledge of the probability that death would result.”

(8) application—murder

(a) executions in the Berishe/Berisa Mountains of Kosovo

Limaj et al., (Trial Chamber), November 30, 2005, para. 664: “The Chamber has held that Haradin Bala and Murrizi, and possibly a third KLA [Kosovo Liberation Army] soldier, were directly involved in shooting at the remaining small group of prisoners, who were among those they had forced to march into the Berishe/Berisa Mountains on 25 or 26 July 1998 and who remained after the first group was released. It has been established that nine of those prisoners were executed that day in a location in the Berishe/Berisa Mountains. Haradin Bala participated physically in the material elements of the crime of murder, jointly with Murrizi, and perhaps with a third KLA soldier. As discussed earlier, in view of the circumstances of the killing and the position of the victims, the Chamber has found that Haradin Bala acted with the intent to commit murder when he participated in the killing of these victims. He is responsible for the murder of the nine prisoners as a direct perpetrator.”

(b) artillery attack on the Old Town of Dubrovnik, Croatia

Strugar, (Trial Chamber), January 31, 2005, paras. 237, 248-250, 255, 258, 259: “In this case the charges of murder arise out of an artillery attack on the Old Town of

Dubrovnik on 6 December 1991. The deaths that are the subject of the murder charge are alleged to have resulted from that shelling by forces of the JNA [Yugoslav Peoples' Army] under the command of the Accused."

"Tonci Skocko died from haemorrhaging caused by shrapnel wound from a shell explosion in the course of the JNA [Yugoslav Peoples' Army] artillery attack on the Old Town on 6 December 1991." "With respect to the *mens rea* required for murder, the Chamber reiterates its findings that the JNA [Yugoslav Peoples' Army] attack on the Old Town was deliberate and that the perpetrators knew it to be populated. The Chamber finds that the perpetrators of the attack can only have acted in the knowledge that the death of one or more of the civilian population of the Old Town was a probable consequence of the attack." "On the basis of the foregoing, and leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Tonci Skocko."

"On the basis of th[e] evidence, the Chamber is [also] satisfied that Pavo Urban was killed in the course of the attack on the Old Town on 6 December 1991." "With respect to the *mens rea* required for murder, the Chamber repeats its finding and reasoning in respect of Tonci Skocko." "On the basis of the foregoing, leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Pavo Urban."

(c) Srebrenica massacre

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 569: "[T]he Trial Chamber finds that it has been established beyond reasonable doubt that more than 7,000 Bosnian men and boys were killed by the members of the [Army of the Republika Srpska] and/or [Ministry of the Interior in Republika Srpska]. It is further proven that the direct perpetrators had the intention to kill or inflict serious injury in the reasonable knowledge that their acts or omissions were likely to cause the death of the victim."

(d) Prijedor municipality—killings at the Keraterm, Omarska, and Trnopolje camps

Stakic, (Trial Chamber), July 31, 2003, paras. 595-596, 616: "Turning to the first category of killings, those committed in the camps, the Trial Chamber is satisfied beyond reasonable doubt that Dr. Stakic, as President of the Crisis Staff in Prijedor, actively participated in and threw the full support of the civilian authorities behind the decision to establish the infamous Keraterm, Omarska, and Trnopolje camps."

"The Trial Chamber finds that the creation and running of these camps, which required the co-operation of the civilian police and military authorities, were acts endangering the lives of thousands of persons, almost exclusively of non-Serb ethnicity, who were detained there. The Trial Chamber has taken note of the evidence that the Accused clearly was aware of the conditions in similar detention camps in Croatia and in

Bosnia and Herzegovina where Serbs were detained. At a meeting held in Prijedor on 15 October 1992 between members of the Government of Republika Srpska and the municipal Government under the Accused on the one hand and the head of the ICRC [International Committee of the Red Cross] in Banja Luka, on the other, the Accused is reported to have asked 'why [the ICRC] was not striving for the release of Serbs being held in camps in Croatia and Bosnia and Herzegovina.' Moreover, in an interview in the 'Kozarski Vjesnik' on 26 June 1992, the Accused is quoted as saying that 'We do not wish to treat the Muslims the way the Muslim extremists have been treating the Serbs in Zenica, Konjic, Travnik, Jajce ... and everywhere in Alija's Bosnia where they are the majority population.' The Trial Chamber finds that these statements show that the Accused was aware of the conditions of life to which Serbs were subjected by other ethnic groups in other parts of the former Yugoslavia. He knew the conditions in the camps set up in the Municipality of Prijedor would not be different from those established in other parts of Yugoslavia."

"The Trial Chamber does not believe that the conscious object of Dr. Stakic's participation in the creation and maintenance of this environment of impunity was to kill the non-Serb citizens of Prijedor municipality. However, it is satisfied that Dr. Stakic, in his various positions, acted in the knowledge that the existence of such an environment would in all likelihood result in killings, and that he reconciled himself to and made peace with this probable outcome. He consequently participated with the requisite *dolus eventualis* and therefore incurs criminal responsibility for all the killings in paragraphs 44 and 47 of the Indictment which this Trial Chamber has found to be proven. The Accused is found guilty of murder, a Violation of the Laws or Customs of War under Article 3 of the Statute in combination with common Article 3 (1) (a) of the Geneva Conventions."

(e) Prijedor municipality—killings during transports and expulsions of the non-Serb civilian population

Stakic, (Trial Chamber), July 31, 2003, para. 600: "With regard to the second category of killings, the Trial Chamber is convinced that many occurred during transports to camps and expulsions of the civilian non-Serb population from the municipality. In particular, as only one example, the Trial Chamber has found that on 21 August 1992 approximately 200 men travelling on a convoy over Mount Vlasic were massacred by armed Serb men. The primary perpetrators of this crime were members of the Prijedor 'Intervention Platoon,' established by order of the Crisis Staff. This platoon comprised individuals with criminal records and people recently released from jail. The 'Intervention Platoon' was established with the objective of terrorising the non-Serb population in Prijedor, presumably to hasten the departure of non-Serbs in large numbers from the territory. To entrust the escort of a convoy of unprotected civilians to such groups of men, as Dr. Stakic along with his co-perpetrators on several occasions did in order to complete the plan for a purely Serb municipality, is to reconcile oneself to

the reasonable likelihood that those traveling on the convoy will come to grave harm and even death. The same applies to the killings referred to in paragraphs 47(5)-(7) of the Indictment perpetrated by the armed escorts accompanying the unarmed non-Serb civilians destined for the camps.”

(f) Prijedor municipality—killings committed as a result of armed military and/or police action in non-Serb areas

Stakic, (Trial Chamber), July 31, 2003, paras. 609, 615: “In the Trial Chamber’s opinion, the ultimatum issued on 23 May 1992, the above-mentioned SJB [Public Security Station] report, and the Accused’s proven awareness of the strength and deployment of the military units in Prijedor establish the knowledge of the Accused that the subsequent attack on Hambarine would result in civilian casualties. The attacks were ordered by the Crisis Staff and carried out even with this knowledge in mind, in complete disregard of the innocent and unprotected civilians living in the area.”

“The Trial Chamber is satisfied that the creation and maintenance of the . . . environment of impunity, in which the rule of law was neither respected nor enforced and which depended on the co-operation of all the pillars of the civil and military authorities, were acts that endangered the lives of all non-Serb citizens of Prijedor municipality.”

v) violence to life and person

Blaskic, (Trial Chamber), March 3, 2000, para. 182: Violence to life and person “is a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing), Article 2(b) (inhuman treatment) and Article 2(c) (causing serious injury to body) of the Statute.” “[T]he *mens rea* is characterised once it has been established that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness.”

But see Vasiljevic, (Trial Chamber), November 29, 2002, para. 203: “In the absence of any clear indication in the practice of states as to what the definition of the offence of ‘violence to life and person’ identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law.”

vi) outrages upon personal dignity

(1) defined

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 161: “[T]he crime of outrages upon personal dignity requires: (i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect.”

(2) requires humiliation so intense any reasonable person would be outraged

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 162: “[T]he humiliation of the victim must be so intense that any reasonable person would be outraged.” The Appeals Chamber held that the Trial Chamber correctly relied not only “on the victim’s purely subjective evaluation of the act to establish whether there had been an outrage upon personal dignity, but used objective criteria to determine when an act constitutes a crime of outrages upon personal dignity.”

Prosecutor v. Aleksoski, Case No. IT-95-14/1 (Trial Chamber), June 25, 1999, paras. 56-57: With respect to the *actus reus* of “outrages upon personal dignity,” “the humiliation to the victim must be so intense that the reasonable person would be outraged.” “The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.”

(3) humiliation must be real and serious

Kumarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 501: “So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be ‘lasting’; . . . it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity. Obviously, if the humiliation and suffering caused is only fleeting in nature, it may be difficult to accept that it is real and serious. However this does not suggest that any sort of minimum temporal requirement of the effects of an outrage upon personal dignity is an *element* of the offence.” (emphasis in original)

Compare Aleksoski, (Trial Chamber), June 25, 1999, para. 54-56: “An outrage upon personal dignity within Article 3 of the Statute is a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within

the *genus*.” “An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament.”

(4) murder is not an outrage upon personal dignity

Kivcka et al., (Trial Chamber), November 2, 2001, para. 172: “[M]urder in and of itself cannot be characterized as an outrage upon personal dignity. Murder causes death, which is different from concepts of serious humiliation, degradation or attacks on human dignity. The focus of violations of dignity is primarily on acts, omission, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment.”

(5) *mens rea*

Kumara, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, paras. 164-166: “[T]he crime of outrages upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity. [T]he crime . . . requires only a knowledge of the ‘possible’ consequences of the charged act or omission.” (emphasis in original)

Aleksovski, (Trial Chamber), June 25, 1999, para. 56: “As for the requisite degree of *mens rea* . . . the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.”

(6) prohibited purpose not required

Kivcka et al., (Trial Chamber), November 2, 2001, para. 226: “The requirement of a prohibited purpose which is characteristic of the offence of torture, is a materially distinct element that is not required in the offence of outrages upon personal dignity.”

(7) discriminatory intent or motive not required

Aleksovski, (Appeals Chamber), March 24, 2000, para. 28: “[I]t is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive.”

(8) examples

Kvočka et al., (Trial Chamber), November 2, 2001, para. 173: “[I]nappropriate conditions of confinement,” “perform[ing] subservient acts,” being “forced to relieve bodily functions in their clothing,” and “endur[ing] the constant fear of being subjected to physical, mental, or sexual violence” in camps were held to be outrages upon personal dignity.

Aleksovski, (Trial Chamber), June 25, 1999, para. 229: “[T]he use of detainees as human shields or trench-diggers constitutes an outrage upon personal dignity.”

Furundžija, (Trial Chamber), December 10, 1998, paras. 172-173: “Rape may . . . amount to . . . a violation of the laws or customs of war” and “Article 3 of the Statute covers outrages upon personal dignity including rape.”

vii) taking of hostages

(1) elements

Blaskić, (Appeals Chamber), July 29, 2004, paras. 638-639: “Hostage-taking as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war was considered by the Trial Chamber in this case, and in the *Kordić and Čerkez* Trial Judgement. In the latter case, the following was stated:

It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement . . .

The additional element . . . is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The [International Committee of the Red Cross] Commentary identifies this additional element as a ‘threat either to prolong the hostage’s detention or to put him to death.’ In the Chamber’s view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition.”

“The Appeals Chamber agrees that the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third

party to do or to abstain from doing something as a condition for the release of that person. The crime of hostage-taking is prohibited by Common Article 3 of the Geneva Conventions, Articles 34 and 147 of Geneva Convention IV, and Article 75(2)(c) of Additional Protocol I.” For the overturning of Blaskić’s conviction for hostage-taking, see *Blaskić*, (Appeals Chamber), July 29, 2004, paras. 635-646.

(2) same as Article 2

Kordić and Cerkez, (Trial Chamber), February 26, 2001, paras. 319-320: “[T]he elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostage as described by Article 2(h).”

Blaskić, (Trial Chamber), March 3, 2000, para. 187: “The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. [I]t to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.”

See also discussion of “taking civilians as hostages” under Article 2, Section (I)(d)(viii), ICTY Digest, and “use of civilians as hostages and human shields” as a form of persecution under Article 5, Section (IV)(d)(viii)(3)(u), ICTY Digest.

viii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity (Article 3(b))

(1) generally

Brđjanin, (Trial Chamber), September 1, 2004, para. 591: “Wanton destruction of cities, towns or villages, or devastation not justified by military necessity constitutes a violation of the laws or customs of war under Article 3 (b) of the Statute. Article 3 (b) of the Statute is based on Article 23 (g) of the Hague Regulations which forbids the unnecessary destruction or seizure of enemy property, unless it is ‘imperatively demanded by the necessities of war.’”

(2) part of customary international law

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 76: “The wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws and customs of war recognised by Article 3(b) of the Statute, is

covered by Article 6(b) of the Nuremberg Charter. This provision is restated in Principle 6 of the Nuremberg principles. It refers to war crimes already covered in Articles 46, 50, 53 and 56 of the Hague Regulations, which are applicable to cases of occupation. However, the violation in question is more narrowly defined than Article 23(g) of the Hague Regulations, which states that it is especially forbidden ‘to destroy [...] the enemy’s property, unless such destruction [...] is imperatively demanded by the necessities of war.’ The Report of the Secretary-General states that the above instrument and the Regulations annexed thereto has beyond doubt become part of international customary law. *A fortiori*, there is no doubt that the crime envisaged by Article 3(b) of the Statute was part of international customary law at the time it was allegedly committed.”

(3) elements

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 74: “The Trial Chamber sets out the specific elements of the crime [of wanton destruction not justified by military necessity]:”

The Trial Chamber considers that the elements for the crime of wanton destruction not justified by military necessity charged under Article 3(b) of the Statute are satisfied where:

- (i) the destruction of property occurs on a large scale;
- (ii) the destruction is not justified by military necessity; and
- (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

The Trial Chamber observes that, while property situated on enemy territory is not protected under the Geneva Conventions, and is therefore not included in the crime of extensive destruction of property listed as a grave breach of the Geneva Conventions, the destruction of such property is criminalised under Article 3 of the Statute.”

See also Stakić, (Trial Chamber), July 31, 2003, para. 761 (same elements); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, paras. 346-347 (same language as quoted).

Strugar, (Trial Chamber), January 31, 2005, paras. 292-293: “While the crime of

¹¹ The *Kordić* case, both at the Appeals Chamber and Trial Chamber levels, appears to conflate “wanton destruction of cities, towns or villages,” and “devastation not justified by military necessity.” See *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 74 (discussing “[w]anton destruction not justified by military necessity”); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, paras. 346-347 (same). The conflation, however, may be harmless in that the *Strugar* case suggests that “destruction” and “devastation” are “largely identical.” See *Strugar*, (Trial Chamber), January 31, 2005, para. 291.

‘devastation not justified by military necessity’ has scarcely been dealt with in the Tribunal’s jurisprudence, the elements of the crime of ‘wanton destruction not justified by military necessity’ were identified by the Trial Chamber in the *Kordić* case, and recently endorsed by the Appeals Chamber in that same case, as follows:

- (i) the destruction of property occurs on a large scale;
- (ii) the destruction is not justified by military necessity; and
- (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.”

“At least in the context of the present trial this definition appears equally applicable to devastation. The Chamber will adopt this definition, with appropriate adaptations to reflect ‘devastation,’ for the crime of ‘devastation not justified by military necessity.’”

Strugar, (Trial Chamber), January 31, 2005, para. 297: “[T]he elements of the crime of ‘devastation not justified by military necessity,’ at least in the present context, may be stated as: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.”

(4) devastation and destruction equated

Strugar, (Trial Chamber), January 31, 2005, para. 291: “Article 3(b) codifies two crimes: ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’ Only the latter is charged in the present case. From a linguistic point of view, the meaning of the two terms, ‘devastation’ and ‘destruction,’ is largely identical. Moreover, the two offences have been treated together by a number of instruments of international humanitarian law. At least in the context of this case, which is concerned with the destruction of buildings in the Old Town of Dubrovnik, the Chamber considers it appropriate to equate the two crimes, while recognising that in other contexts, e.g. laying waste to crops or forests, the crime of devastation may have a wider application.”

(5) destruction or damage to property on a large scale (element 1)

Strugar, (Trial Chamber), January 31, 2005, para. 294: “Turning to the first element, that is, that the devastation occurred on a ‘large scale,’ the Chamber is of the view that while this element requires a showing that a considerable number of objects were damaged or destroyed, it does not require destruction in its entirety of a city, town or village.”

(6) not justified by military necessity (element 2)

Strugar, (Trial Chamber), January 31, 2005, para. 295: “The second requirement is that

the act is ‘not justified by military necessity.’ The Chamber is of the view that military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’ Whether a military advantage can be achieved must be decided, as the Trial Chamber in the *Galić* case held, from the perspective of the ‘person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.’ In other words, each case must be determined on its facts. Recalling its earlier finding that there were no military objectives in the Old Town on 6 December 1991, the Chamber is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case.”

Brđanin, (Trial Chamber), September 1, 2004, para. 592: “Article 3 (b) of the Statute is wide in scope, protecting all property in the territory involved in a war, including that located in enemy territory. The protection afforded under Article 3 (b) of the Statute is however, limited by the military necessity exception. The destruction or devastation of property in the territory involved in a war is prohibited except where it is justified by military necessity.”

Blaskić, (Trial Chamber), March 3, 2000, para. 183: “Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.”

See also Kordić and Cerkez, (Appeals Chamber), December 17, 2005, para. 686: “Military necessity’ has already been defined in Article 14 of the Lieber Code of 24 April 1863 as the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war. It follows that the unnecessary or wanton application of force is prohibited and that ‘a belligerent may apply only that amount and kind of force necessary to defeat the enemy.’ This principle is, *e.g.*, the basis for the prohibition on employing arms, projectiles, or material calculated to cause unnecessary suffering (Article 23[e] of Hague Convention IV).”

(7) *mens rea* (element 3)

Strugar, (Trial Chamber), January 31, 2005, para. 296: “According to the consistent case-law of the Tribunal the *mens rea* requirement for a crime under Article 3(b) is met when

the perpetrator acted with either direct or indirect intent, the latter requiring knowledge that devastation was a probable consequence of his acts.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 593: “With respect to the *mens rea* requisite of destruction or devastation of property under Article 3 (b), the jurisprudence of this Tribunal is consistent. The destruction or devastation must have been either perpetrated intentionally, with the knowledge and will of the proscribed result, or in reckless disregard of the likelihood of the destruction or devastation.”

See also “destruction of property or means of subsistence” as underlying the crime of persecution under Article 5, Section (IV)(d)(viii)(3)(a), ICTY Digest, and “extensive destruction and appropriation of property not justified by military necessity, and carried out willfully and wantonly” under Article 2, Section (I)(d)(iv), ICTY Digest.

(8) application—wanton destruction of cities, towns or villages, or devastation not justified by military necessity

Jokić - Miodrag, (Trial Chamber), March 18, 2004, para. 45: “Two crimes among those to which Miodrag Jokić has pleaded guilty – devastation not justified by military necessity and unlawful attack on civilian objects – are, in the present case, very serious crimes in view of the destruction that one day of shelling ravaged upon the Old Town [of Dubrovnik] and its long-lasting consequences. According to the Plea Agreement, six buildings in the Old Town were destroyed, and many more buildings suffered damage. ‘Hundreds, perhaps up to a thousand projectiles’ hit the Old Town on 6 December 1991.”

For the finding in the *Strugar* case that the attack on the Old Town of Dubrovnik on December 6, 1991 constituted devastation not justified by military necessity, see *Strugar*, (Trial Chamber), January 31, 2005, para. 328. While the Trial Chamber found that all the elements of the crime were met, the Trial Chamber did not enter a conviction for that crime, because it found the conviction would be cumulative of other convictions.

ix) plunder (Article 3(c))

(1) generally

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 77: “Acts of plunder, which have been deemed by the International Tribunal to include pillage, infringe various norms of international humanitarian law. Both Article 6(b) of the Nuremberg Charter and Article 2(1)(b) of Control Council Law No. 10, as Article 3(e) of the Statute, punish the war crime of ‘plunder of public and private property.’ Pillage has been proscribed in Articles 28 and 47 of the Hague Regulations and Article 7 of Hague Convention IX. Protection against pillage is provided for the military wounded and sick by Article 15 of Geneva Convention I, and for the civilian wounded and sick by Article 16 of Geneva Convention IV. Article 33 of Geneva Convention IV, moreover, grants a general prohibition against pillage.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 98: “[A]cts of plundering infringe upon a number of norms of international humanitarian law and constitute a violation of the laws and customs of war under Article 3(e) of the Statute.”

(2) defined

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 79, 84: “The Appeals Chamber has not previously set out a definition for the crime of plunder as mentioned in Article 3(e) of the Statute. The Trial Chamber held that the essence of the offence was defined as:

all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as ‘pillage.’

The Appeals Chamber concurs with this assessment. It notes that in accordance with Geneva Convention IV, the Statute itself does not draw a difference between public or private property.”

“The Appeals Chamber therefore finds that the crime of plunder is committed when private or public property is appropriated intentionally and unlawfully. Furthermore, the general requirements of Article 3 of the Statute in conjunction with Article 1 of the Statute relating to the seriousness of the crime must be fulfilled.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 99: “It has been held that plunder within the meaning of the Statute encompasses ‘all forms of unlawful appropriation of property in armed conflicts for which individual criminal responsibility attaches under international law’ and extends to both cases of ‘organized’ and ‘systematic’ seizure of property from protected persons in occupied territories, as well as

to ‘acts of looting committed by individual soldiers for their private gain.’”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 612: “This crime has been defined as ‘willful and unlawful appropriation of property,’ and, as enshrined in Article 3(e) of the Statute, it may affect both private and public property.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 617: “Plunder as a crime under Article 3(e) of the Statute has been committed when: i) the general requirements of Article 3 of the Statute, including the seriousness of the violation, are fulfilled; ii) private or public property was appropriated unlawfully and willfully.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 352: “The essence of the offence [of plunder] is defined by *Celebici* [a/k/a *Delalić*] as ‘all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as “pillage.”’”

Jelisić, (Trial Chamber), December 14, 1999, para. 48: “Plunder is defined as the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto.”

(3) plunder includes both large-scale seizures and appropriation by individual soldiers for their private gain

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, paras. 612-613: “The term [plunder] is general in scope, comprising not only large-scale seizures of property within the framework of systematic economic exploitations of occupied territory but also acts of appropriation committed by individual soldiers for their private gain. . . .” *Kunarac* “held that the word ‘plunder’ . . . would require a theft at least committed by at least one person.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 352: “Such acts of appropriation include both widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain.”

Blaskic, (Trial Chamber), March 3, 2000, para. 184: “The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the ‘organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.’”

Jelisić, (Trial Chamber), December 14, 1999, para. 48: “The . . . ‘prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.’ [T]he individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators.”

(4) plunder must involve serious violation: requires grave consequences /sufficient monetary value measured individually or collectively

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 80-83: “According to Article 3, read in conjunction with Article 1 of the Statute, only serious violations of international law fall under the jurisdiction of this International Tribunal. The Appeals Chamber in *Tadić* specified that ‘serious’ is to be understood as both a breach of a rule protecting important values *and* a breach that involves grave consequences for the victim. It explained that:

for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’ although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby ‘private property must be respected’ by any army occupying an enemy territory.”

“The prohibition of unjustified appropriation of private or public property is without a doubt a rule that protects important values. The norms mentioned above reflect the fact that it is not only the protected persons themselves that are protected from harmful conduct but also their property.”

“The question remains at what point the breach actually involves grave consequences for the victim. The Trial Chamber in *Celebići* [a/k/a *Delalić*] referred to the *Tadić* Appeal Decision on Jurisdiction, when it held that there is a consequential link between the monetary value of the appropriated property and the gravity of the consequences for the victim. The Appeals Chamber agrees with this conclusion. However, it stresses that the assessment of when a piece of property reaches the threshold level of a certain value can only be made on a case-by-case basis and only in conjunction with the general circumstances of the crime.”

“The Appeals Chamber is, moreover, of the view that a serious violation could be assumed in circumstances where appropriations take place *vis-à-vis* a large number of people, even though there are no grave consequences for each individual. In this case it would be the overall effect on the civilian population and the multitude of offences committed that would make the violation serious.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 101: “As a serious violation of the laws or customs of war falling under the jurisdiction of the Tribunal, the acts of plunder must involve great consequences for the victims. This will be the case when the property is of sufficient monetary value, or when property is appropriated from a large number of people, in which case the scale and the overall impact of the acts of looting will amount to a serious violation of the laws and customs of war.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, paras. 613-614: “[P]lunder must involve grave consequences for the victims, thus amounting to a ‘serious violation.’” *Celebići, a/k/a Delalić*, held that “in order for the dispossession to involve grave consequences for the victim(s), the property has to be of ‘sufficient monetary value.’” “Plunder may be a serious violation not only when one victim suffers severe economic consequences because of the appropriation, but also, for example, when property is appropriated from a large number of people.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 352: “[T]he prohibition against unjustified appropriation of private or public property constitutes a rule protecting important values.’ To measure that importance, *Celebići [a/k/a Delalić]* refers to ‘sufficient monetary value’ of the property so appropriated as to involve ‘grave consequences for the victims.’”

(5) where prohibition of plunder applies

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 78: “The prohibition of plunder is general in its application and not limited to occupied territories only. This is confirmed by the fact that Article 33 of Geneva Convention IV is placed in Part III of the Convention, which contains provisions that apply both in occupied territory and anywhere in the territory of a Party to the conflict. Likewise, Article 28 of the Hague Regulations is found in the section dealing with hostilities. The text of the Nuremberg Charter and Control Council Law No. 10 also do not require the crime to be committed in occupied territory.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 615: “Article 3(e) of the Statute proscribes plunder committed on the entire territory of the parties to a conflict . . . [T]he prohibition of pillage is not limited to acts committed in occupied territories. . . .”

(6) plunder includes “pillage” and “looting”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 98: “The Trial Chamber notes that the question of whether the acts of looting constitute the specific offence of

plunder is largely a terminological one. Linguistic and comparative legal sources indicate that the two terms are generally used synonymously. The Trial Chamber also refers to the *Celebić* [a/k/a *Delalić*] Trial Judgement finding that the terms ‘pillage,’ ‘plunder,’ and ‘spoliation’ varyingly have been used to describe the unlawful appropriation of public and private property during armed conflicts and that ‘plunder’ should be understood as encompassing acts traditionally described as ‘pillage.’ Considering the above, the Trial Chamber is of the view that ‘looting’ is likewise a form of unlawful appropriation of property in armed conflict and is therefore embraced within ‘plunder’ as incorporated in the Statute.”

Blaskić, (Trial Chamber), March 3, 2000, para. 184: “Plunder ‘should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as “pillage.””

(7) when property may be requisitioned lawfully

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 100: “The Trial Chamber notes that in certain circumstances, property may be requisitioned lawfully under international humanitarian law. These circumstances are defined by The Hague Regulations and are limited to the following: taxes and dues imposed within the purview of the existing laws, or requisitions for the needs of the army of occupation, which shall be proportional to the resources of the country. Private property also may be seized if it is needed for the conduct of military operations and should be returned and compensated upon termination of the conflict. Monetary contributions may be collected only under a written order issued by the commander-in-chief in accordance with the tax rules in force and for every contribution a receipt should be issued.”

(8) application—plunder

Jelić, (Trial Chamber), December 14, 1999, para. 49: “[T]he accused stole money, watches, jewellery and other valuables from the detainees upon their arrival at [the] Luka camp by threatening those who did not hand over all their possessions with death. The accused was sometimes accompanied by guards . . . but he mostly acted alone. The Trial Chamber holds that these elements are sufficient to confirm the guilt of the accused on the charge of plunder.”

See also “destruction of property or means of subsistence” as underlying the crime of persecution under Article 5, Section (IV)(d)(viii)(3)(a), ICTY Digest, and “extensive destruction and appropriation of property not justified by military necessity, and carried out willfully and wantonly,” under Article 2, Section (I)(d)(iv), ICTY Digest.

- x) **seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science (Article 3(d))**

(1) generally

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 85: “The seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science constitute a violation of the law or customs of war under Article 3(d) of the Statute.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 594 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 765 (similar).

Jokić - Miodrag, (Trial Chamber), March 18, 2004, para. 46: “[T]he crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science . . . represents a violation of values especially protected by the international community.”

(a) protection under international humanitarian law

Jokić - Miodrag, (Trial Chamber), March 18, 2004, paras. 47-50: “Codification prohibiting the destruction of institutions of this type [cultural property] dates back to the beginning of the last century, with the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land (the ‘Hague Regulations’) and the Hague Convention Concerning Bombardment by Naval Forces in Time of War of 18 October 1907.” “The 1954 Hague Convention provides a more stringent protection for ‘cultural property,’ as defined in Article 1 of the Convention. The protection comprises duties of safeguard and respect of cultural property under ‘general protection.’” “The preamble to the UNESCO [United Nations Educational, Scientific and Cultural Organization] World Heritage Convention provides ‘that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.’”

“Additional Protocols I (art. 53) and II (art. 16) of 1977 to the Geneva Conventions of 1949 reiterate the obligation to protect cultural property and expand the scope of the prohibition by, inter alia, outlawing ‘any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.’ According to the Additional Protocols, therefore, it is prohibited to direct attacks against this kind of protected property, whether or not the attacks result in actual damage. This immunity is clearly additional to the protection attached to civilian objects.”

For additional discussion of the protections provided under Articles 52 and 53 of

Additional Protocol I to the Geneva Conventions of 1949 (“Additional Protocol I”), and Article 1 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (“the Hague Convention of 1954”), see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 89-91.

For discussion of acts against cultural property proscribed by Article 27 of the Hague Regulations of 1907 [Convention (IV) respecting the Laws and Customs of War], the Hague Convention of 1954, Article 53 of Additional Protocol I and Article 16 of Additional Protocol II to the Geneva Conventions of 1949, see *Strugar*, (Trial Chamber), January 31, 2005, paras. 303-309.

(i) institutions dedicated to religion protected under international humanitarian law

Brđjanin, (Trial Chamber), September 1, 2004, para. 595: “Institutions dedicated to religion are protected under the Statute and under customary international law. Articles 27 and 56 of the Hague Regulations provide for the protection in armed conflict of, among others, buildings or institutions dedicated to religion. The protection is reiterated in both Additional Protocol I and II to the Geneva Conventions, in Articles 53 and 16 respectively.”

(b) crime reflects customary international law

Strugar, (Trial Chamber), January 31, 2005, para. 312: “[T]he definition established by the jurisprudence of the Tribunal [of destruction or wilful damage of cultural property] appears to reflect the position under customary international law.”

(i) destruction of educational buildings part of customary international law

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 92: “[T]he Appeals Chamber finds that the Trial Chamber erred when it considered that ‘educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples.’ The Trial Chamber did not consider whether and under which conditions the destruction of educational buildings constituted a crime *qua custom* at the time it was allegedly committed. Although Hague Convention IV is considered by the Report of the Secretary-General as being without doubt part of international customary law, it does not explicitly refer to buildings dedicated to education. The same applies to Article 53 of Additional Protocol I and it is suggested that the adjective ‘cultural’ used in Article 53 applies to historic monuments and works of art and cannot be construed as applying to all institutions dedicated to education such as schools. Schools are, however, explicitly mentioned in Article 52 of Additional Protocol I, which relates to schools, places of worship and other civilian buildings. Article 23(g) of the Hague Regulations states that it is especially forbidden to ‘destroy [...] the enemy’s property, unless such

destruction [...] is imperatively demanded by the necessities of war.’ The Report of the Secretary-General states that the above instrument and the Regulations annexed thereto have beyond doubt become part of international customary law. There is no doubt that the crime envisaged of destruction of educational buildings was part of international customary law at the time it was allegedly committed.”

(2) elements

Strugar, (Trial Chamber), January 31, 2005, para. 312: “For the purposes of this case, an act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 605: “[A] crime under Article 3(d) of the Statute has been committed when: i) the general requirements of Article 3 of the Statute are fulfilled; ii) the destruction regards an institution dedicated to religion; iii) the property was not used for military purposes; iv) the perpetrator acted with the intent to destroy the property.”

Blaskic, (Trial Chamber), March 3, 2000, para. 185: To show the destruction or wilful damage to institutions dedicated to religion or education, “the damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.”¹²

(3) actual damage or destruction required

Strugar, (Trial Chamber), January 31, 2005, para. 308: “Article 3(d) of the Statute explicitly criminalises only those acts which result in damage to, or destruction of, such property. Therefore, a requisite element of the crime charged in the Indictment is actual

¹² This last requirement, that the institutions must not have been in the immediate vicinity of military objectives, is rejected in the *Strugar* and *Naletilic* cases. See “whether there is a requirement that the institutions may not be in the immediate vicinity of military objectives.” Section (I)(d)(x)(5), ICTY Digest.

damage or destruction occurring as a result of an act directed against this property.”

(4) military purposes exception

Strugar, (Trial Chamber), January 31, 2005, para. 310: “[T]he established jurisprudence of the Tribunal confirming the ‘military purposes’ exception which is consistent with the exceptions recognised by the Hague Regulations of 1907 and the Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 597, 598, 596: “[T]he exception to the protection of institutions dedicated to religion is set out in Article 27 of the Hague Regulations: “[a]ll necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, *provided that they are not being used at the time for military purposes.*” (emphasis in original)

“The ‘military purpose’ exception to the protection of institutions dedicated to religion has been confirmed consistently by this Tribunal. The Trial Chamber agrees that the protection afforded under Article 3 (d) is lost if the property is used for military purposes.”

“[Institutions dedicated to religion] may be attacked only when they become a military objective. Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”

(5) whether there is a requirement that the institutions may not be in the immediate vicinity of military objectives

Strugar, (Trial Chamber), January 31, 2005, paras. 300-301, 310: ‘The *Blaskić* Trial Chamber adopted the following definition [of Article 3(d) of the Statute]:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.”

“The *Naletilić* Trial Judgement, while rejecting the *Blaskić* holding that, in order to be protected, the institutions must not have been located in the immediate vicinity of military objectives, held that the elements of this crime with respect to destruction of institutions dedicated to religion would be satisfied if: ‘(i) the general requirements of Article 3 of the Statute are fulfilled; (ii) the destruction regards an institution dedicated to

religion; (iii) the property was not used for military purposes; (iv) the perpetrator acted with the intent to destroy the property.”

“[W]ith regard to the differences between the *Blaskić* and *Naletilić* Trial Judgements noted above (regarding the use of the immediate surroundings of cultural property for military purposes), and leaving aside any implication of the issue of imperative military necessity, the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. Therefore, contrary to the Defence submission, the Chamber considers that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were ‘directed against’ that cultural property, rather than the military installation or use in its immediate vicinity.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 604: “The Chamber respectfully rejects that protected institutions ‘must not have been in the vicinity of military objectives,’” and “does not concur with the view that the mere fact that an institution is in the ‘immediate vicinity of military objective’ justifies its destruction.”

But see Blaskić, (Trial Chamber), March 3, 2000, para. 185: “[T]he institutions must not have been in the immediate vicinity of military objectives.”

(6) *mens rea*

Strugar, (Trial Chamber), January 31, 2005, para. 311: “As for the *mens rea* element for this crime [destruction or wilful damage of cultural property], the Chamber is guided by the previous jurisprudence of the Tribunal that a perpetrator must act with a direct intent to damage or destroy the property in question. There is reason to question whether indirect intent ought also to be an acceptable form of *mens rea* for this crime, but that is an issue not directly raised by the circumstances of this case.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 605: As to the *mens rea* for “a crime under Article 3(d) of the Statute,” it requires a showing that “the perpetrator acted with the intent to destroy the property.”

Blaskić, (Trial Chamber), March 3, 2000, para. 185: To show the destruction or wilful damage to institutions dedicated to religion or education, “the damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts.”

Compare Brdjanin, (Trial Chamber), September 1, 2004, para. 599: “With respect to the *mens rea* requisite of destruction or devastation of property under Article 3 (d), the jurisprudence of this Tribunal is consistent by stating that the *mens rea* requirement is intent (*dolus directus*). The Trial Chamber holds that as religious institutions enjoy the minimum protection afforded to civilian objects the *mens rea* requisite for this offence should be equivalent to that required for the destruction or devastation of property under Article 3 (b). The Trial Chamber, therefore, is of the opinion that the destruction or wilful damage done to institutions dedicated to religion must have been either perpetrated intentionally, with the knowledge and will of the proscribed result or in reckless disregard of the substantial likelihood of the destruction or damage.”

(7) overlap with offense of unlawful attacks on civilian objects

Strugar, (Trial Chamber), January 31, 2005, para. 302: “[T]he *Kordić* Trial Judgement held that while this offence [destruction or wilful damage of cultural property] overlaps to a certain extent with the offence of unlawful attacks on civilians objects, when the acts in question are directed against cultural heritage, the provision of Article 3(d) is *lex specialis*.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 596: “The offence of destruction or wilful damage to institutions dedicated to religion overlaps to a certain extent with the offence of unlawful attacks on civilian objects except that the object of the offence of destruction or wilful damage to institutions dedicated to religion is more specific.”

For discussion of “unlawful attacks on civilians and civilian objects,” see Section (II)(d)(xi), ICTY Digest.

(8) application—seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science

(a) destruction—attack by the JNA (Yugoslav Peoples’ Army) on the old Town of Dubrovnik

Strugar, (Trial Chamber), January 31, 2005, paras. 317-320, 327, 326: “[T]he Chamber has found that there was an artillery attack by the JNA [Yugoslav Peoples’ Army] forces under the command of the Accused on the Old Town of Dubrovnik on 6 December 1991.” “The Chamber finds that . . . 52 [buildings and structures] were destroyed or damaged during the 6 December shelling of the Old Town by the JNA [Yugoslav Peoples’ Army].” “The most seriously affected were six buildings which were completely destroyed, *i.e.* burned out, on 6 December 1991.” “The Chamber also observes that among those buildings which were damaged in the attack, were

monasteries, churches, a mosque, a synagogue and palaces.” “[T]he Chamber finds that the Old Town sustained damage on a large scale as a result of the 6 December 1991 JNA [Yugoslav Peoples’ Army] attack.” “[T]he Chamber observes that the Old Town of Dubrovnik in its entirety was entered onto the World Heritage List in 1979 upon the nomination of the [Socialist Federal Republic of Yugoslavia].” “The Chamber therefore concludes that the attack launched by the JNA [Yugoslav Peoples’ Army] forces against the Old Town on 6 December 1991 was an attack directed against cultural property within the meaning of Article 3(d) of the Statute, in so far as that provision relates to cultural property.”

(b) not justified by military necessity

Strugar, (Trial Chamber), January 31, 2005, para. 328: “[T]here is no evidence to suggest that any of the 52 buildings and structures in the Old Town which the Chamber has found to have been destroyed or damaged on 6 December 1991, were being used for military purposes at that time. Therefore, the buildings were protected as cultural property under Article 3(d) of the Statute at the time they incurred damage.” “In this respect, the Chamber affirms that in its finding there were no military objectives in the immediate vicinity of the 52 buildings and structures which the Chamber has found to have been damaged on 6 December 1991, or in the Old Town or in its immediate vicinity. In the Chamber’s finding, the destruction or damage of property in the Old Town on 6 December 1991 was not justified by military necessity.”

(c) *mens rea*

Strugar, (Trial Chamber), January 31, 2005, paras. 329-330: “As to the *mens rea* element . . . the Chamber makes the following observations. . . . [I]he direct perpetrators’ intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town’s status as a UNESCO [United Nations Educational, Scientific and Cultural Organization] World Heritage site. As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA [Yugoslav Peoples’ Army] positions at Zarkovica and elsewhere, above the Old Town on 6 December 1991.” “Leaving aside for the present the question of the Accused’s responsibility, the Chamber finds that all elements of the offence of . . . destruction or wilful damage of cultural property . . . are established.”

xi) unlawful attack on civilians and civilian objects

(1) defined

Strugar, (Trial Chamber), January 31, 2005, para. 283: “The Chamber . . . concludes that the crime of attacks on civilians or civilian objects . . . is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack.”

Galic, (Trial Chamber), December 5, 2003, para. 62: “The Trial Chamber finds that an attack on civilian . . . is constituted of acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.”

Galic, (Trial Chamber), December 5, 2003, para. 56: “[T]he Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.”

Compare Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 328: “[P]rohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.”¹³

¹³ The requirement that the attack not be “justified by military necessity” has since been repudiated. See “no military necessity justification for attacking civilians or civilians objects,” Section (I)(d)(xi)(8), ICTY Digest.

(2) prohibition against attacking civilians stems from fundamental principle of distinction

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 54: “The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants, between civilian objects and military objectives and accordingly to direct military operations only against military objectives. Article 48 of Additional Protocol I enunciates the principle of distinction as a basic rule. In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice (‘ICJ’) described the principle of distinction, along with the principle of protection of the civilian population, as ‘the cardinal principles contained in the texts constituting the fabric of humanitarian law’ and stated that ‘States must never make civilians the object of attack.’ As the ICJ [International Court of Justice] held: ‘These fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.’” (emphasis in original)

(3) crime of attacking civilians or civilian objects is customary international law

Strugar, (Trial Chamber), January 31, 2005, para. 223: “The offence of attacking civilian objects is a breach of a rule of international humanitarian law. As already ruled by the Chamber in the present case and upheld by the Appeals Chamber, Article 52 [of Additional Protocol I to the Geneva Conventions], referred to in respect of the count of attacking civilian objects, is a reaffirmation and reformulation of a rule that had previously attained the status of customary international law.”

Galić, (Trial Chamber), December 5, 2003, para. 62: “The Trial Chamber finds that an attack on civilian [*sic*] can be brought under Article 3 by virtue of customary international law and, in the instant case, also by virtue of conventional law . . .”

(4) attack

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 47: “The term attack is defined in Article 49 of Additional Protocol I as ‘acts of violence against the adversary, whether in offence or in defence.’ Therefore, in determining whether an unlawful attack on civilians occurred, the issue of who first made use of force is irrelevant.”

Strugar, (Trial Chamber), January 31, 2005, para. 282: “Pursuant to Article 49(1) of

Additional Protocol I to the Geneva Conventions ‘attacks’ are acts of violence against the adversary, whether in offence or in defence. According to the ICRC [International Committee of the Red Cross] Commentary an attack is understood as a ‘combat action’ and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict.”

Galic, (Trial Chamber), December 5, 2003, para. 52: “The jurisprudence of the Tribunal has defined ‘attack’ as a course of conduct involving the commission of acts of violence. In order to be punishable under Article 3 of the Statute, these acts have to be carried out during the course of an armed conflict.”

(5) unlawful attack on civilians

(a) the civilian population shall not be the object of attack

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 48: “The civilian population as such shall not be the object of attack. This fundamental principle of international customary law is specified in Articles 51(2), and 51(3) of Additional Protocol I. Article 50(1) of Additional Protocol I states that

[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. . . .”

Galic, (Trial Chamber), December 5, 2003, para. 49: “The use of the expression ‘civilian population as such’ in Article 51(2) of Additional Protocol I indicates that ‘the population must never be used as a target or as a tactical objective.’” (emphasis in original)

(b) civilian population defined

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 50: “The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”

Strugar, (Trial Chamber), January 31, 2005, para. 282: “As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.”

Galic, (Trial Chamber), December 5, 2003, para. 47: “For the purpose of the protection of victims of armed conflict, the term ‘civilian’ is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to

the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.”

(c) factors to consider in evaluating whether civilian

Galic, (Trial Chamber), December 5, 2003, para. 50: “In certain situations it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian.”

(d) cases of doubt

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 48: “Article 50(1) of Additional Protocol I states that . . . ‘[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.’ The Appeals Chamber notes that the imperative ‘in case of doubt’ is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.”

Strugar, (Trial Chamber), January 31, 2005, para. 282: “Article 50 (1) of Additional Protocol I provides for the assumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

Galic, (Trial Chamber), December 5, 2003, para. 50: “A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status. The Commentary to Additional Protocol I explains that the presumption of civilian status concerns ‘persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked.’ The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.” *See also Galic*, (Trial Chamber), December 5, 2003, para. 55 (“In case of doubt as to the status of a person, that person shall be considered to be a civilian.”).

See also “construe civilian population liberally/ cases of doubt,” under Article 5, Section (IV)(b)(iv)(2)(c), ICTY Digest.

**(e) presence of individual combatants within the population
does not change its civilian character**

Strugar, (Trial Chamber), January 31, 2005, para. 282: “The presence of certain non-civilians among the targeted population does not change the character of that

population. It must be of a 'predominantly civilian nature.'"

Galic, (Trial Chamber), December 5, 2003, para. 50: "The presence of individual combatants within the population does not change its civilian character."

(f) combatants and others directly engaged in hostilities are legitimate military targets

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 50: "[A]ccording to Article 51(3) of Additional Protocol I, civilians are protected against attacks, unless and for the time they take part directly in hostilities."

Galic, (Trial Chamber), December 5, 2003, para. 48: "The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I is suspended when and for such time as they directly participate in hostilities. To take a 'direct' part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces. As the *Kupreskic* Trial Chamber explained:

the protection of civilian and civilian objects provided by modern international law may cease entirely or be reduced or suspended [...] if a group of civilians takes up arms [...] and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention of 1949.

Combatants and other individuals directly engaged in hostilities are considered to be legitimate military targets."

(g) combatant defined

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 50: "Read together, Articles 43 and 50 of Additional Protocol I and Article 4A of Geneva Convention III establish that members of armed forces (other than medical personnel and chaplains) and members of militias or volunteer corps forming part of such armed forces are 'combatants' and cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war."

(h) combatants obligated to distinguish themselves from civilian population

Galic, (Trial Chamber), December 5, 2003, para. 50: "In order to promote the protection of civilians, combatants are under the obligation to distinguish themselves at all times

from the civilian population; the generally accepted practice is that they do so by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly.”

(i) members of territorial defense and armed forces at home remain combatants

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 51: “[T]he Appeals Chamber considers that members of the armed forces resting in their homes in the area of the conflict, as well as members of the TO [Territorial Defense] residing in their homes, remain combatants whether or not they are in combat, or for the time being armed.” See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 51 (discussing the basis for this holding, namely the Commentary on the Additional Protocols).

(j) collateral civilian damage/ principle of proportionality

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 52: “It is . . . accepted that attacks aimed at military objectives, including objects and combatants, may cause ‘collateral civilian damage.’ International customary law recognises that in the conduct of military operations during armed conflicts a distinction must be drawn at all times between persons actively taking part in the hostilities and civilian population and provides that

- the civilian populations as such shall not be the object of military operations, and
- every effort be made to spare the civilian populations from the ravages of war, and
- all necessary precautions should be taken to avoid injury, loss or damage to the civilian population.

Nevertheless, international customary law recognises that this does not imply that collateral damage is unlawful *per se*.” (emphasis omitted)

Galic, (Trial Chamber), December 5, 2003, para. 58: “The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’ If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual

perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”

(6) unlawful attack on civilian objects

(a) civilian objects or property

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 53: “Article 52(1) of Additional Protocol I prohibits explicitly attacks or reprisals on civilian objects. It defines civilian objects as ‘all objects which are not military objectives.’”

Strugar, (Trial Chamber), January 31, 2005, para. 282: “The Chamber reiterates that ‘civilian property covers any property that could not be legitimately considered a military objective.’”

(b) military objectives

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 53: “Article 52(1) defines military objectives as ‘limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’”

Galic, (Trial Chamber), December 5, 2003, para. 51: “[I]n accordance with the principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked. A widely accepted definition of military objectives is given by Article 52 of Additional Protocol I as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’”

(c) cases of doubt

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 53: “Article 52(3) of Additional Protocol I provides that in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Appeals Chamber notes that the imperative ‘in case of doubt’ is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether an object is a civilian one rests on the Prosecution.”

Galic, (Trial Chamber), December 5, 2003, para. 51: “In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an

effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”

(7) indiscriminate attacks may qualify as direct attacks against civilians

Galic, (Trial Chamber), December 5, 2003, para. 57: “[T]he Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians. It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I. This prohibition reflects a well-established rule of customary law applicable in all armed conflicts.”

(8) no military necessity justification for attacking civilians or civilians objects

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 54 (as corrected by CORRIGENDUM TO JUDGEMENT OF 17 DECEMBER 2004): “The Appeals Chamber clarifies that the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”

Blaskic (Appeals Chamber), July 29, 2004, para. 109: “[T]he Appeals Chamber deems it necessary to rectify the Trial Chamber’s statement, contained in paragraph 180 of the Trial Judgement, according to which ‘[t]argeting civilians or civilian property is an offence when not justified by military necessity.’ The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.”

Strugar, (Trial Chamber), January 31, 2005, para. 280: “The Appeals Chamber recently clarified some of the jurisprudence relating to the various elements of the crime. First, the Appeals Chamber rejected any exemption on the grounds of military necessity and underscored that there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law. In this respect, the Chamber would observe that on the established facts in the present case, there was no possible military necessity for the attack on the Old Town on 6 December 1991.”

Galic, (Trial Chamber), December 5, 2003, paras. 42-45: “In the *Blaskic* case the Trial Chamber observed in relation to the *actus reus* [of the offense of attack on civilians] that

‘the attack must have caused deaths and /or serious bodily injury within the civilian population or damage to civilian property. [...] Targeting civilians or civilian property is an offence when not justified by military necessity.’ On the *mens rea* it found that ‘such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.’ The Trial Chamber in the *Kordić and Čerkez* case held that ‘prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.’”

“The Trial Chamber follows the above-mentioned jurisprudence to the extent that it states that an attack which causes death or serious bodily injury within the civilian population constitutes an offence. As noted above, such an attack when committed wilfully is punishable as a grave breach of Additional Protocol I.”

“The Trial Chamber does not however subscribe to the view that the prohibited conduct set out in the first part of Article 51(2) of Additional Protocol I is adequately described as ‘targeting civilians when not justified by military necessity.’ This provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity.”

“The Trial Chamber recalls that the provision in question explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities. The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.”

(9) attack must have caused deaths and/or serious injury to body or health, or extensive damage to civilian objects

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, paras. 55-57: “The Trial Chamber stated that an element of the conviction for the crime of unlawful attack directed against civilians or civilian objects under Article 3 of the Statute is that the attacks must be shown to have caused deaths and/or serious bodily injuries or extensive damage to civilian objects.” “The Appeals Chamber notes that some uncertainty has arisen in the jurisprudence of the International Tribunal as to whether a perpetrator incurs criminal responsibility under the Statute for such unlawful attack prohibited under Articles 51 and 52 of Additional Protocol I, if the attacks result in non-serious civilian casualties or damage, or none at all.” “The Appeals Chamber finds that the Trial Chamber was correct to state that, at the times the acts of unlawful attack were

committed in this case, they must be shown to have resulted in serious injury to body or health to incur criminal responsibility” For the reasoning of the Trial Chamber, see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 63-67.

Strugar, (Trial Chamber), January 31, 2005, para. 280: “[T]he Appeals Chamber confirmed that criminal responsibility for unlawful attacks requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects. With respect to the scale of the damage required, the Appeals Chamber, while not discussing the issue in detail, appeared to endorse previous jurisprudence that damage to civilian objects be extensive. In the present case however, in light of the extensiveness of the damage found to have been caused, the Chamber finds no need to elaborate further on the issue and will proceed on the basis that if extensive damage is required, it has been established in fact in this case.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 328: “[P]rohibited attacks [launched deliberately against civilians or civilian objects] must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.”

Blaskić, (Trial Chamber), March 3, 2000, para. 180: “[T]he attack [against civilians or civilian objects] must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property.”

(10) violations by one side of duty to remove civilians from vicinity of military objectives does not relieve other side of duty to respect principles of distinction and proportionality

Galic, (Trial Chamber), December 5, 2003, para. 61: “[T]he parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.”

(11) *mens rea*

Strugar, (Trial Chamber), January 31, 2005, para. 283: As regards *mens rea* [for the crime of attacks on civilians or civilian objects], such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack.” “[T]he issue whether a standard lower than that of a direct intent may also be sufficient does not arise in the present case.”

Galic, (Trial Chamber), December 5, 2003, para. 54: “Article 85 of Additional Protocol I explains the intent required for the application of the first part of Article 51(2). It expressly qualifies as a grave breach the act of *wilfully* ‘making the civilian population or individual civilians the object of attack.’ The Commentary to Article 85 of Additional Protocol I explains the term as follows:

wilfully: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this encompasses the concepts of ‘wrongful intent’ or ‘recklessness,’ *viz.*, the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, *i.e.*, when a man acts without having his mind on the act or its consequences.

The Trial Chamber accepts this explanation, according to which the notion of ‘wilfully’ incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts ‘wilfully.’”

(a) awareness of civilian or civilian property status

Halilovic, (Trial Chamber), November 16, 2005, para. 36: “In relation to the *mens rea*, the Trial Chamber notes that the Trial Chamber in the *Galic* case stated, concerning the crime of attacks on civilians set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, and punishable under Article 3 of the Statute:

[f]or the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.

... The Trial Chamber agrees with the *Galic* Trial Chamber that the Prosecution must show that the perpetrator was aware or should have been aware of this status of the victim.” See also *Galic*, (Trial Chamber), December 5, 2003, para. 55 (same language as quoted).

Strugar, (Trial Chamber), January 31, 2005, para. 283: As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack.”

(b) mens rea of a disproportionate attack

Galic, (Trial Chamber), December 5, 2003, paras. 59, 60: “To establish the *mens rea* of a disproportionate attack the Prosecution must prove . . . that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive

civilian casualties.” “The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.”

(12) application—unlawful attack on civilians and civilian objects

(a) campaign of sniping at, and shelling of, civilians in Sarajevo

Galic, (Trial Chamber), December 5, 2003, paras. 596, 584-586, 589, 591, 594: “The Trial Chamber is satisfied beyond reasonable doubt that the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period [from around September 10, 1992 to August 1994]. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.”

“All residents of [Army of Bosnia and Herzegovina]-held areas of Sarajevo who appeared before this Trial Chamber testified to the effect that no civilian activity and no areas of Sarajevo held by the [Army of Bosnia and Herzegovina] seemed to be safe from sniping or shelling attacks from [Sarajevo Romanija Corps]-held territory. The Majority heard reliable evidence that civilians were targeted during funerals, in ambulances, in hospitals, on trams, on buses, when driving or cycling, at home, while tending gardens or fires or clearing rubbish in the city. . . . [C]ivilians were targeted while using public transport vehicles running during cease-fires. . . . [T]he witness Akif Mukanovic recounted in detail how his wife was killed by a bullet while at home in Hrasno. . . . [Another] victim recounted how she was targeted while cycling back from the hospital in Dobrinja; in [another incident], the victim told the Trial Chamber how he was targeted while collecting rubbish in the area of Hrasno under the escort of the UNPROFOR [UN Protection Force in Bosnia]. . . . Residents of urban or rural areas of Sarajevo testified about the targeting of civilians fetching water and detailed evidence to prove examples of such targeting was adduced Civilians were targeted while shopping . . . , while gathered in square . . . or during sportive festivities organised on a public day. . . . Even children were targeted in schools, or while playing outside, riding a bicycle, near their home, or in the street. . . . The most populated areas of Sarajevo seemed to be particularly subject to indiscriminate or random shelling attacks. . . . A resident of Alipasino Polje, Diho, testified about entire façades of houses on Ante Babica street

‘pock-marked’ with shell pieces and grenades of all calibres and other apartment blocks targeted by [Sarajevo Romanija Corps] forces.”

“The natural and urban topography of the city of Sarajevo, such as ridges and high-rise buildings, provided vantage-points to [Sarajevo Romanija Corps] forces to target civilians moving around the city. The Trial Chamber heard evidence of the existence of specific areas throughout the city of Sarajevo which became notorious as sources of sniping fire directed at civilians. . . . Throughout the city of Sarajevo, witnesses described points in [Sarajevo Romanija Corps]-controlled territory, such as the Jewish Cemetery, the Orthodox Church and the School for the Blind in the area of Nedarici, Spicasta Stijena, Mount Trebevic and Baba Stijena or Orahov Brijeg as prominent sources of sniper fire against civilians. The same pattern of regular fire at civilians from [Sarajevo Romanija Corps]-controlled positions or areas appears consistently throughout [Army of Bosnia and Herzegovina]-held areas of the city of Sarajevo during the Indictment Period.”

“The evidence in the Trial Record also discloses that although civilians adapted to that hostile environment by closing schools, living at night, hiding during the day in their apartment or cellar, moving around the city of Sarajevo as little as possible, setting up containers and barricades to provide shelter against sniping fire, they were still not safe from sniping and shelling fire from [Sarajevo Romanija Corps]-controlled territory. Witnesses recounted how civilians tilled at night, fetched water or collected wood at night or when the visibility was reduced or developed alternative routes to traverse the city to avoid sniping fire directed against civilians seen from [Sarajevo Romanija Corps]-controlled territory. Nevertheless, they were still seen and targeted.”

“The evidence in the Trial Record conclusively establishes that the pattern of fire throughout the city of Sarajevo was that of indiscriminate or direct fire at civilians in [Army of Bosnia and Herzegovina]-held areas of Sarajevo from [Sarajevo Romanija Corps]-controlled territory not that of combat fire where civilians were accidentally hit.”

“The Majority is convinced by the evidence in the Trial Record that civilians in [Army of Bosnia and Herzegovina]-held areas of Sarajevo were directly or indiscriminately attacked from [Sarajevo Romanija Corps]-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured.”

“In sum, the Majority finds that a series of military attacks on civilians in [Army of Bosnia and Herzegovina]-held areas of Sarajevo and during the Indictment Period were carried out from [Sarajevo Romanija Corps]-controlled territories with the aim to spread terror among that civilian population. The Majority accepts the Prosecution’s stand that as such, these attacks carried out with a specific purpose, constituted a campaign of sniping and shelling against civilians.”

But see Galic, (Trial Chamber), Separate and Partially Dissenting Opinion of Judge Nieto-Navia, December 5, 2003, paras. 2-107 (concluding that the evidence does not establish that the Sarajevo Romanija Corps waged a campaign of purposefully targeting civilians).

(b) Old Town of Dubrovnik, Croatia

Strugar, (Trial Chamber), January 31, 2005, paras. 288-289: “The Chamber has found that the Old Town [of Dubrovnik, which contained no military objectives and was a protected World Heritage site, with a residential population of between 7,000 and 8,000, including families, women and children] was extensively targeted by JNA [Yugoslav Peoples’ Army] artillery and other weapons on 6 December 1991 and that no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA. Hence, in the Chamber’s finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town. The Chamber has, in addition, found that a relatively few military objectives (actual or believed) in the wider city of Dubrovnik, but outside the Old Town, were targeted by JNA forces on 6 December 1991. These were, in most cases, widely separated and in positions distant from the Old Town. Shelling targeted at the Croatian military positions in the wider Dubrovnik, including those closer to the Old Town, and whether actual or believed positions, would not cause damage to the Old Town, for reasons given in this decision. That is so for all JNA weapons in use on 6 December 1991, including mortars. In addition to this, however, the Chamber has found there was also extensive targeting of non-military objectives outside the Old Town in the wider city of Dubrovnik.” “[T]he deliberate JNA [Yugoslav Peoples’ Army] shelling of the Old Town on 6 December 1991 has been proved to have resulted in the death of two civilians and caused injuries to civilians. There was also extensive damage to civilian objects. Accordingly, and leaving aside for the present the issue of the Accused’s criminal responsibility, the Chamber finds that the elements of the offence of attacks on a civilian population and civilian objects have been established.”

xii) unlawful confinement of civilians

Kordic and Cerkez (Appeals Chamber), December 17, 2004, para. 73: “[T]he detention or confinement of civilians will be unlawful in the following two circumstances:

- (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.*, they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and
- (ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.”

(1) involuntary confinement not absolutely necessary is unlawful

Kordic and Cerkez (Appeals Chamber), December 17, 2004, paras. 69-70: “The confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV, which states:

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.”

“Thus, the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful.”

(2) basic procedural rights must be respected

Kordic and Cerkez (Appeals Chamber), December 17, 2004, para. 70: “[A]n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV. That article provides:

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.”

**(3) where a person is definitely suspected of, or engaged in,
activities hostile to the security of the state**

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 71-72: “The Appeals Chamber noted further in *Celebici* [a/k/a *Delalić*] that Article 5 of Geneva Convention IV imposes certain restrictions on the protections which may be enjoyed by certain individuals under the Convention. It provides, in relevant part:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. [...]

In each case, such persons shall nevertheless be treated with humanity, and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

This provision reinforces the principle behind Article 42 of Geneva Convention IV, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.”

See also “unlawful deportation or transfer or unlawful confinement of a civilian” under Article 2, Section (I)(d)(vii), ICTY Digest, and “unlawful confinement” underlying persecution under Article 5, Section (IV)(d)(viii)(3)(d), ICTY Digest.

xiii) unlawful labor

(1) defined

Naletilić and Martinović, (Trial Chamber), March 31, 2003, paras. 250-261: “[T]he offence of unlawful labour against prisoners of war may be defined as an intentional act or omission by which a prisoner of war is forced to perform labour prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III” and which “fall[s] under Article 3 of the Statute.” “[N]ot all labour is prohibited during times of armed conflict. . . . Article 49 of Geneva Convention III establishes a principle of compulsory labour for prisoners of war. The basic principle stated in Paragraph 1 of this provision [Article 49 of Geneva Convention III] ‘is the right of the Detaining Power to require prisoners of war to work.’ Nevertheless, this principle is subject to two fundamental conditions, the first one relating to the prisoner himself, and the second one to the nature of the work required.

Thus, prisoners of war may be required to work provided that this is done in their own interest, and those considerations relating to their age and sex, physical aptitude and rank are taken into account. Articles 50 and 52 of Geneva Convention III define which type of labour might be required and which might not. It is emphasised in the Commentary that: “[t]he core of the question is still the distinction to be made between activities considered as being connected with war operations and those which are not.”

(2) *mens rea*

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 260: “In order to establish the *mens rea* requirement for the crime of unlawful labour, the Prosecution must prove that the perpetrator had the intent that the victim would be performing prohibited work. The intent can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed.”

For discussion of occupation as relevant to unlawful labor, see Section (I)(c), ICTY Digest.

For further discussion of unlawful labor, see “use of forced labor” as a form of cruel treatment under Article 3, Section (II)(d)(iii)(6)(b); “forced labor assignments may constitute slavery” under Article 3, Section (II)(d)(xiv)(3), ICTY Digest, *et seq.*; enslavement under Article 5, Section (IV)(d)(iii)(5), ICTY Digest; forced labor as underlying the crime of persecution, Article 5, Section (IV)(d)(viii)(3)(p), ICTY Digest.

xiv) slavery

(1) defined

Krnjelac, (Trial Chamber), March 15, 2002, paras. 350-351: “Enslavement under Article 5 . . . has been defined by the Tribunal as the exercise of any or all of the powers attaching to the right of ownership over a person. The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers. Although not enumerated under Article 3, slavery may still be punishable under that Article if the four requirements specific to Article 3 . . . are met.”

(2) same as “enslavement” under Article 5

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 85: “Trial Chambers of the Tribunal have held that the charge of ‘forced labour assignments’ may constitute the basis of the crime of enslavement as a crime against humanity under Article 5(c), and the

offence of slavery as a violation of the laws or customs of war under Article 3 of the Statute”

Krnjelac, (Trial Chamber), March 15, 2002, para. 356: “The Trial Chamber is satisfied that the offence of slavery under Article 3 . . . is the same as the offence of enslavement under Article 5. As such, slavery under Article 3 requires proof of the same elements as constitute enslavement under Article 5.”

(3) forced labor assignments may constitute slavery

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 85-87: “Trial Chambers of the Tribunal have held that the charge of ‘forced labour assignments’ may constitute the basis of the crime of enslavement as a crime against humanity under Article 5(c), and the offence of slavery as a violation of the laws or customs of war under Article 3 of the Statute, and as such this offence is of sufficient gravity to support a charge of persecution.” “The underlying acts of the charge of ‘forced labour assignments’ infringe upon certain provisions of Geneva Conventions III and IV, and as such may constitute a violation of the laws or customs of war other than grave breaches of the Geneva Conventions, falling within the scope of Article 3 of the Statute. It is settled case-law of the Tribunal that the law of the Geneva Conventions is part of customary international law.” “International humanitarian law generally prohibits forced or involuntary labour in international, as well as internal armed conflicts.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 359: “[T]he exaction of forced or compulsory labour or service’ is an ‘indication of enslavement,’ and a ‘factor to be taken into consideration in determining whether enslavement was committed.’”

(4) consider factual circumstances to determine whether labor was involuntary

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 87: “As held in the *Krnjelac* Trial Judgement, the determination of whether protected persons laboured involuntarily is a factual question, which has to be considered in light of all factual circumstances on a case by case basis.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 359: “[T]he determination of whether protected persons laboured involuntarily is a factual question which has to be considered in light of all the relevant circumstances on a case by case basis. Such circumstances may include the following:

The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of

coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.

What must be established is that the relevant persons had no real choice as to whether they would work.”

(5) not all types of forced or compulsory labor are *per se* unlawful

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 88-89: “Not all types of forced or compulsory labour are *per se* unlawful under international humanitarian law. Article 51 of Geneva Convention IV, applicable in international armed conflicts, sets out the circumstances under which civilians may be made to work. It allows persons above 18 years of age to be subjected to compulsory labour in two narrowly defined categories and only if strict conditions are met. Compulsory labour may be lawful only if required for the needs of the army of occupation for maintaining public services, and for the feeding, sheltering, clothing, transportation or health, for the benefit of the population of the occupied country. Civilians however cannot be requisitioned for such work as ‘the construction of fortifications, trenches, or aerial bases,’ nor can forced labour be performed for strategic or tactical interests of the army. It should be noted that international humanitarian law has endorsed the principle of narrow interpretation of this provision. A commentary noted that:

the stringent interpretation of the kinds of work permitted as compulsory labour is intended to protect individuals against abuse and injury. It proscribes all types of modern slavery for the benefit of the occupying power. It is also intended to prevent the assignment of inhabitants to locations that might be military objectives, since they would then be exposed to dangers associated with attacks against military targets.”

“Similarly, under Geneva Convention III, prisoners of war may be subjected to certain types of involuntary labour. The Convention however proscribes compelling prisoners of war to do dangerous or unhealthy work, or assigning a prisoner of war to ‘labour that would be looked upon as humiliating for a member of the detaining power’s own forces.’ While the text of the Convention refers to the removal of mines as an example of dangerous work, the Commentary to the Convention notes that the ban on forced dangerous work is intended to cover labour done ‘in the vicinity either of key military objectives or [. . .] of the battlefield.’”

(6) conditions for labor under international humanitarian law

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 90: “If persons protected under Geneva Conventions III and IV are made to work, international humanitarian law sets out the conditions under which this may be done. Under Geneva

Convention III, prisoners of war are entitled to ‘suitable working conditions, especially as regards to accommodation and food.’ Geneva Convention IV requires that working conditions for civilians in occupied territories, such as payment, working hours, safety, and others, should comply with the legislation in force in the occupied country. In the context of a non-international armed conflict, civilians deprived of liberty, if made to work, shall have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.”

See also discussion of enslavement under Article 5(c), Section (IV)(d)(iii), ICTY Digest. For discussion of forced labor as a form of cruel treatment under Article 3, see Section (II)(d)(iii)(6)(b), ICTY Digest. For discussion of forced labor as underlying the crime of persecution under Article 5, see Section (IV)(d)(viii)(3)(p), ICTY Digest.

xv) terror against the civilian population

(1) defined

Galic, (Trial Chamber), December 5, 2003, para. 133: “[T]he crime of terror against the civilian population in the form charged in the Indictment is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.”

See also *Galic*, (Trial Chamber), December 5, 2003, para. 137: “The Majority accepts the Prosecution’s rendering of ‘terror’ as ‘extreme fear.’”

(2) “terror” is a crime within international humanitarian law

Galic, (Trial Chamber), December 5, 2003, para. 138: “The Majority is of the view that an offence constituted of acts of violence wilfully directed against the civilian population or individual civilians causing death or serious injury to body or health within the civilian population with the primary purpose of spreading terror among the civilian population – namely the crime of terror as a violation of the laws or customs of war – formed part of the law to which the Accused and his subordinates were subject to during the Indictment period [from around September 10, 1992 to August 1994]. Terror as a crime

within international humanitarian law was made effective in this case by treaty law. The Tribunal has jurisdiction *ratione materiae* by way of Article 3 of the Statute. Whether the crime of terror also has a foundation in customary law is not a question which the Majority is required to answer.”

But see “dissent questions whether ‘terror’ constitutes a crime within the Tribunal’s jurisdiction,” Section (II)(d)(xv)(6), ICTY Digest.

(3) actual infliction of terror not an element of the crime

Galic, (Trial Chamber), December 5, 2003, para. 134: “The Majority rejects the Parties’ submissions that actual infliction of terror is an element of the crime of terror. The plain wording of Article 51(2), as well as the *travaux préparatoires* of the Diplomatic Conference exclude this from the definition of the offence. Since actual infliction of terror is not a constitutive legal element of the crime of terror, there is also no requirement to prove a causal connection between the unlawful acts of violence and the production of terror, as suggested by the Parties.”

(4) “acts of violence” do not include legitimate attacks against combatants

Galic, (Trial Chamber), December 5, 2003, para. 135: “With respect to the ‘acts of violence,’ these do not include legitimate attacks against combatants but only unlawful attacks against civilians.”

(5) *mens rea*

Galic, (Trial Chamber), December 5, 2003, para. 136: “‘Primary purpose’ signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.”

(6) dissent questions whether “terror” constitutes a crime within the Tribunal’s jurisdiction

Galic, (Trial Chamber), Separate and Partially Dissenting Opinion of Judge Nieto-Navia, December 5, 2003, paras. 108, 109, 111-113: “The Majority finds that the Trial Chamber has jurisdiction by way of Article 3 of the Statute to consider the offence constituted of ‘acts of violence wilfully directed at a civilian population or against

individual civilians causing death or serious injury to body or health of individual civilians[.] with the primary purpose of spreading terror among the civilian population.’ I respectfully dissent from this conclusion because I do not believe that such an offence falls within the jurisdiction of the Tribunal.”

“In his Report to the Security Council regarding the establishment of the Tribunal, the Secretary-General explained that ‘the application of the [criminal law] principle of *nullum crimen sine lege* requires that the international tribunal should apply rules which are beyond any doubt part of customary law.’ The Secretary-General’s Report therefore lays out the principle that the Tribunal cannot create new criminal offences, but may only consider crimes already well-established in international humanitarian law. Such a conclusion accords with the imperative that ‘under no circumstances may a court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable or punishable, or by criminalizing an act which had not until the present time been regarded as criminal.’”

“Thus, an offence will fall within the jurisdiction of the Tribunal only if it existed as a form of liability under international customary law.”

“The Accused is charged pursuant to Article 3 of the Statute with ‘unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949.’ Since such an offence has never been considered before by this Tribunal, it would seem important to determine whether this offence existed as a form of liability under international customary law in order to confirm that it properly falls within the jurisdiction of this Trial Chamber. The Majority repeatedly retreats from pronouncing itself though on the customary nature of this offence and, in particular, does not reach any stated conclusion on whether such an offence would attract individual criminal responsibility for acts committed during the Indictment Period [from around September 10, 1992 to August 1994] under international customary law. Instead, it argues that such individual criminal responsibility attaches by operation of conventional law. In support of this conclusion, it observes that the parties to the conflict had entered into an agreement dated 22 May 1992 in which they had committed to abide by Article 51 of the Additional Protocol I, particularly with respect to the second part of the second paragraph of that article which prohibits ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population.’”

“The signing of the 22 May Agreement does not suffice though to satisfy the jurisdictional requirement that the Trial Chamber may only consider offences which are reflected in international customary law. Even if I accepted – *quod non* – that the Trial Chamber has the necessary *ratione materiae* to consider the offence of inflicting terror on a civilian population by virtue of the signing of the 22 May Agreement, the *ratione personae* requirement would still have to be satisfied, meaning that this offence must have attracted individual criminal responsibility under international customary law for acts

committed at the time of the Indictment Period. The Prosecution and the Majority cited few examples indicating that the criminalization of such an offence was an admitted state practice at such a time. In my view, these limited references do not suffice to establish that this offence existed as a form of liability under international customary law and attracted individual criminal responsibility under that body of law. I therefore conclude that the offence of inflicting terror on a civilian population does not fall within the jurisdiction of this Trial Chamber.”

(7) application—terror against the civilian population

Galic, (Trial Chamber), December 5, 2003, para. 597: “The Majority is . . . satisfied that crime of terror within the meaning of Article 3 of the Statute was committed against the civilian population of Sarejevo during the Indictment Period [from around September 10, 1992 to August 10, 1994]. In relation to the *actus reus* of the crime of terror as examined above, the Trial Chamber has found that acts of violence were committed against the civilian population of Sarajevo during the Indictment Period. The Majority has also found that a campaign of sniping and shelling was conducted against the civilian population of [Army of Bosnia and Herzegovina]-held areas of Sarajevo with the primary purpose of spreading terror.” See also “campaign of sniping at, and shelling of, civilians in Sarajevo,” Section (II)(d)(xi)(12)(a), ICTY Digest.

See also “terrorizing the civilian population” as underlying the crime of persecution, Section (IV)(d)(viii)(3)(n), ICTY Digest.

III) GENOCIDE (ARTICLE 4)

a) Statute

ICTY Statute, Article 4:

“1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
- (a) genocide;
 - (b) conspiracy to commit genocide;
 - (c) direct and public incitement to commit genocide;
 - (d) attempt to commit genocide;
 - (e) complicity in genocide.”

b) Generally

i) defined

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 640: “Article 4 of the Statute characterises genocide by the following constitutive elements:

- (1) one or several of the underlying acts of the offence, which consist of two parts: (i) the *actus reus* enumerated in subparagraphs (a) to (e) of Article 4(2); and (ii) the *mens rea* required for the commission of each; and
- (2) the specific intent of the crime of genocide, which is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

See also Brdjanin, (Trial Chamber), September 1, 2004, para. 681 (similar).

Krstic, (Trial Chamber), August 2, 2001, para. 550: “Genocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means. Those are two elements of the special intent requirement of genocide: (1) the act or acts must target a national, ethnical, racial or religious group; (2) the act or acts must seek to destroy all or part of that group.”

Jelavic, (Trial Chamber), December 14, 1999, para. 62: “Genocide is characterised by two legal ingredients according to the terms of Article 4 of the Statute: [1] the material element of the offence, constituted by one or several acts enumerated in paragraph 2 of Article 4; [2] the *mens rea* of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

ii) definition reflects customary international law and *jus cogens*

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 639: “Article 4(2) and (3) of the Statute reproduce *verbatim* Article II and III of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 (‘Genocide Convention’). It is widely recognised that the law set out in the Convention reflect customary international law and that the norm prohibiting genocide constitutes *jus cogens*.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 680 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 500 (similar).

iii) interpretive sources

Stakić, (Trial Chamber), July 31, 2003, para. 501: “The Trial Chamber, noting the principle of non-retroactivity of substantive criminal law, relies primarily on the following sources when interpreting the crime of genocide:

- the Convention against Genocide interpreted in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties;
- the object and purpose of the Convention as reflected in the *travaux préparatoires*;
- subsequent practice including the jurisprudence of the ICTY, ICTR and national courts;
- the publications of international authorities.”

c) Specific intent/ *dolus specialis*: intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

i) generally

Jelisić, (Appeals Chamber), July 5, 2001, para. 46: “The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 656 (quoting same).

Jelisić, (Appeals Chamber), July 5, 2001, para. 45: “The Statute itself defines the intent required: the intent to accomplish certain specified types of destruction. This intent has been referred to as, for example, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 655: “Article 4 of the Statute describes the specific intent of the crime of genocide as the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’”

Brđanin, (Trial Chamber), September 1, 2004, para. 695: “The acts prohibited in subparagraphs (a) to (c) of Article 4(2) of the Statute are elevated to genocide when it is proved that the perpetrator not only wanted to commit those acts but also intended to destroy the targeted national, ethnical, racial or religious group in whole or in part, as such. This intent has been referred to, *inter alia*, as special intent, specific intent and *dolus specialis*. . . . It is this specific intent that characterises the crime of genocide.”

Stakić, (Trial Chamber), July 31, 2003, para. 520: “Genocide is a unique crime where special emphasis is placed on the specific intent. The crime is, in fact, characterised and

distinguished by a ‘surplus’ of intent. The acts proscribed in Article 4(2) of the Statute, sub-paragraphs (a) to (c), are elevated to genocide when it is proved that the perpetrator not only wanted to commit those acts but also intended to destroy the targeted group in whole or in part as a separate and distinct entity. The level of this intent is the *dolus specialis* or ‘specific intent,’ terms that can be used interchangeably.”

ii) intent to destroy

(1) goal must be destruction of group as a separate and distinct entity

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 670: “[T]he Trial Chamber recalls that the specific intent must be to destroy the group as a separate and distinct entity.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 698 (same).

Brdjanin, (Trial Chamber), September 1, 2004, para. 698: “The Trial Chamber concurs with the observation made by the *Sikirica* Trial Chamber that: “[t]he ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.”

(2) even if destruction was not original goal, it may become the goal

Krstic, (Trial Chamber), August 2, 2001, para. 572: “It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation.”

(3) requires an intentional attack against a group, and the intention to participate in or carry out the attack

Jelavic, (Trial Chamber), December 14, 1999, para. 78: “[T]he Trial Chamber will have to verify that there was both an intentional attack against a group and an intention upon the part of the accused to participate in or carry out this attack.”

(4) knowledge that underlying crime would inevitably or likely result in destruction insufficient/ destruction must be the aim

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 656: “It is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime(s).”

(5) because specific intent to destroy is key, not necessary to prove actual destruction of group in whole or in part, although actual destruction may constitute evidence of specific intent

Brđjanin, (Trial Chamber), September 1, 2004, para. 697: “In view of the specific intent required for genocide, it is not necessary to prove the *de facto* destruction of the group in whole or in part. Nevertheless, the *de facto* destruction of the group may constitute evidence of the specific intent and may also serve to distinguish the crime of genocide from the inchoate offences in Article 4(3) of the Statute, such as the attempt to commit genocide.”

Stakić, (Trial Chamber), July 31, 2003, para. 522: “The key factor is the specific intent to destroy the group rather than its actual physical destruction. As pointed out by the Trial Chamber in *Semanza*, ‘there is no numeric threshold of victims necessary to establish genocide.’ This Trial Chamber emphasises that in view of the requirement of a surplus of intent, it is not necessary to prove a *de facto* destruction of the group in part and therefore concludes that it is not necessary to establish, with the assistance of a demographer, the size of the victimised population in numerical terms. It is the genocidal *dolus specialis* that predominantly constitutes the crime.”

(6) no lengthy premeditation required

Krstić, (Trial Chamber), August 2, 2001, para. 572: “Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period.”

(7) must intend/seek physical or biological destruction

Prosecutor v. Krstić, Case No. IT-98-33-A (Appeals Chamber), April 19, 2004, para. 25: “The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. The Chamber stated: ‘[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.’”

Brđjanin, (Trial Chamber), September 1, 2004, para. 694: “[T]he Trial Chamber notes that ‘[t]he [Genocide Convention], and customary international law in general, prohibit only the physical or biological destruction of a human group.’ In this context, the [International Law Commission] has stated as follows:

[a]s clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction,' which must be taken only in its material sense, its physical or biological sense."

Krstić, (Trial Chamber), August 2, 2001, para. 580: "[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group."

Compare Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 657-659: "The Appeals Chamber [in *Krstić*] has recently confirmed that, by using the term 'destroy,' '[t]he Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group.' In the *travaux préparatoires* of the Convention, a distinction was made between physical or biological genocide on the one hand and cultural genocide on the other. The International Law Commission described the difference between these concepts in the following terms:

[T]he destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction,' which must be taken only in its material sense, its physical or biological sense."

"The Trial Chamber notes that what was originally intended to be excluded from the definition of the crime was cultural genocide, and that this does not in itself prevent that physical or biological genocide could extend beyond killings of the members of the group. The Trial Chamber acknowledges that there have been attempts, both in the Tribunal's case-law and in other sources, to interpret the concept of physical or biological destruction in this way."

"In this respect, the Trial Chamber recalls the opinion of Judge Shahabuddeen, in the *Krstić* Appeal Judgement, according to which a 'distinction should be made between the nature of the listed "acts" [of genocide] and the "intent" with which they are done.' While the listed acts indeed must take a physical or biological form, the same is not required for the intent. With the exceptions of the acts listed in Article 4(2)(c) and (d), 'the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.' Judge Shahabuddeen found that:

It is the group which is protected. A group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which

a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.

Judge Shahabuddeen concluded that “[t]he intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.” See *Krstić*, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 45-54.

(a) not required that the perpetrator choose the most efficient method of destruction

Krstić, (Appeals Chamber), April 19, 2004, para. 32: “In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent. The international attention focused on Srebrenica, combined with the presence of the UN troops in the area, prevented those members of the VRS [Army of Republika Srpska] Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution.”

(b) acts that do not cause death included in destruction

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 662: “A broader notion of the term ‘destroy,’ encompassing also ‘acts which may fall short of causing death,’ had already been considered by the ICTR. In the *Akayesu* case the Trial Chamber found that acts of rape and sexual violence formed an integral part of the process of destruction of the Tutsi as a group and could therefore constitute genocide. In particular, the Trial Chamber stated that[.]

[t]hese rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole [...] Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.

The Trial Chambers in the *Kayishema and Ruzindana* case and in the *Musema* case concurred with this view.”

(c) forcible transfer may be a basis from which to infer intent to destroy

Krstić, (Appeals Chamber), April 19, 2004, para. 33: “The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of [intent]”

(d) whether forcible transfer may in certain circumstances be part of destruction

Krstić, (Appeals Chamber), April 19, 2004, para. 33: “[F]orcible transfer does not constitute in and of itself a genocidal act”

Krstić, (Appeals Chamber), April 19, 2004, para. 31: “[F]orcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica.”

Krstić, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, para. 35: “[S]tanding alone, forcible transfer is not genocide. But in this case the transfer did not stand alone”

For additional discussion of the *Krstić* Appeals Chamber decision where forcible transfer was deemed “an additional means by which to ensure the physical destruction of the Bosnian Muslim Community in Srebrenica,” see Section (III)(d)(i)(3), ICTY Digest.

Stakić, (Trial Chamber), July 31, 2003, para. 519: “It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. As [an expert witness] has stated, ‘[t]his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation. This is because the dissolution of the group is not to be equated with physical destruction.’ In this context the Chamber recalls that a proposal by Syria in the Sixth Committee to include ‘[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ as a separate sub-paragraph of Article II of the Convention against Genocide was rejected by twenty-nine votes to five, with eight abstentions. In this context the Chamber recalls that a proposal by Syria in the Sixth Committee to include ‘[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ as a separate sub-paragraph of Article II of the Convention against Genocide was rejected by twenty-nine votes to five, with eight abstentions.”

But see *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, paras. 663, 665-666: “Regarding displacement of people, further support for a broader notion of destruction can also be found elsewhere. Judge Elihu Lauterpacht, in the case before the International Court of Justice concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, concluded, in his separate opinion, that:

[...] the *forced migration of civilians* [...] is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide [...].

Furthermore, the Commission of Experts found that:

The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example *deported on a large scale or forced to flee*, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.

The Trial Chamber observes that a number of UN General Assembly resolutions have equated ‘ethnic cleansing,’ which includes as a central component the forcible transfer and deportation of civilians, with genocide.”

“The Trial Chamber finds that the term ‘deport’ in the genocide definition can encompass the forcible transfer of a population. The Trial Chamber recalls that the specific intent for the crime of genocide must be to destroy the group as a separate and distinct entity. In this regard, the Trial Chamber concurs with the observation made by the *Sikirica* Trial Chamber that:

[t]he ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.”

“The Trial Chamber finds . . . that the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members. In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was. The Trial Chamber emphasises that its reasoning and

conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction.”

See also discussion of the *Blagojević* and *Jokić* Trial Chamber decision where forcible transfer was viewed as “a manifestation of specific intent to rid the Srebrenica enclave of its Bosnian Muslim population,” discussed at Section (III)(d)(ii)(1), ICTY Digest.

Compare discussion of the *Brđanin* Trial Chamber decision, where the Trial Chamber found mass deportation insufficient as evidence of special intent to commit genocide, discussed, Section (III)(d)(iii)(1), ICTY Digest.

(8) not limited to destruction of civilians/ could include detained military personnel

Krstić, (Appeals Chamber), April 19, 2004, para. 226: “[T]he intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided that the perpetrator intends to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group. It may be that, in practice, the perpetrator’s genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide.”

For discussion of the substantial part requirement, see “substantial’ part of group required,” Section (III)(c)(iii)(2), ICTY Digest.

(9) distinguish specific intent from motive

Blaskić, (Appeals Chamber), July 29, 2004, para. 694: “*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law, but it ‘becomes relevant at the sentencing stage in mitigation or aggravation of the sentence.’ Motive is also to be considered in two further circumstances: first, where it is a required element in crimes such as specific intent crimes, which by their nature require a particular motive; and second, where it may constitute a form of defence, such as self-defence. As the Appeals Chamber held in the *Jelić* and *Kunarac* Appeal Judgements and in the ICTR *Kayishema and Ruzindana* Appeal Judgement:

The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide

may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.

The Appeals Chamber wishes to assert the important distinction between ‘intent’ and ‘motivation.’ The Appeals Chamber holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.

The Appeals Chamber notes that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2(2)(a) through to (e) were committed ‘with intent to destroy, in whole or in part a national, ethnical, racial or religious group.’”

Krnjelać, (Appeals Chamber), September 17, 2003, para. 102: “The Appeals Chamber further recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out ‘the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.’” See also *Jelisić*, (Appeals Chamber), July 5, 2001, para. 49 (same quoted language).

Brdjanin, (Trial Chamber), September 1, 2004, para. 696: “In the *Jelisić* case, the Appeals Chamber recalled: ‘the necessity to distinguish specific intent from motive (...) The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the *Tadić* appeal judgement the Appeals Chamber stressed the irrelevance and “inscrutability of motives in criminal law.”’”

(10) no policy or plan required, but may be important factor

Krstić, (Appeals Chamber), April 19, 2004, para. 225: “The Appeals Chamber has explained . . . that ‘the existence of a plan or policy is not a legal ingredient of the crime’ of genocide. While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence.”

Jelisić, (Appeals Chamber), July 5, 2001, para. 48: “[T]he existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 705 (same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 656: “The Appeals Chamber [in *Jelisić*] . . . found that the existence of a plan or policy is not a legal requirement of the crime.”

(11) inferring intent

(a) intent may be inferred

Krstić, (Appeals Chamber), April 19, 2004, para. 34: “Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.” *See also Jelisić*, (Appeals Chamber), July 5, 2001, para. 47 (similar).

Brđjanin, (Trial Chamber), September 1, 2004, para. 704: “The Trial Chamber notes that it is generally accepted in the jurisprudence of the Tribunal and of the ICTR that, in the absence of direct evidence, the specific intent for genocide can be inferred from ‘the facts, the concrete circumstances, or a “pattern of purposeful action.””

Jelisić, (Trial Chamber), December 14, 1999, para. 78: “[T]he intention necessary for the commission of a crime of genocide may not be presumed even in the case where the existence of a group is at least in part threatened.”

(b) standard for inferring intent

Krstić, (Appeals Chamber), April 19, 2004, para. 41: “The Appeals Chamber has taken the view that, when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 970: “Where an inference needs to be drawn, it has to be *the only reasonable inference available on the evidence*.” (emphasis in original)

(c) factors for inferring specific intent

Jelisić, (Appeals Chamber), July 5, 2001, para. 47: “As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred . . . from a number of facts and

circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 971-989: In examining whether specific intent for genocide could be inferred, the court looked to four factors: (a) the extent of the actual destruction; (b) the existence of a genocidal plan or policy; (c) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; (d) the utterances of the accused. The Trial Chamber concluded that examination of these factors in the situation of the targeting the Bosnian Muslims and Bosnian Croats of the Autonomous Region of Krajina “do not allow the Trial Chamber to legitimately draw the inference that the underlying offences were committed with the specific intent required for the crime of genocide.”

Stakić, (Trial Chamber), July 31, 2003, para. 526: “It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts, the concrete circumstances, or ‘a pattern of purposeful action.’”

**(d) proof of mental state for underlying act may serve as
evidence from which to infer specific intent**

Krstić, (Appeals Chamber), April 19, 2004, para. 20: “The proof of the mental state with respect to the commission of the underlying act can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 706 (quoting same).

**(e) not necessary to prove statements showing genocidal
intent**

Krstić, (Appeals Chamber), April 19, 2004, para. 34: “The Defence . . . argues that the record contains no statements by members of the VRS [Army of Republika Srpska] Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative. Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.”

(f) an inference of genocidal intent may be drawn even where individuals with intent are not precisely identified

Krstić, (Appeals Chamber), April 19, 2004, para. 34: “The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 707 (same).

(g) application—inferring intent

Krstić, (Appeals Chamber), April 19, 2004, para. 21: “The Trial Chamber determined that Radislav Krstić had the intent to kill the Srebrenica Bosnian Muslim men of military age. This finding is one of intent to commit the requisite genocidal act – in this case, the killing of the members of the protected group, prohibited by Article 4(2)(a) of the Statute. From this intent to kill, the Trial Chamber also drew the further inference that Krstić shared the genocidal intent of some members of the VRS [Army of Republika Srpska] Main Staff to destroy a substantial part of the targeted group, the Bosnian Muslims of Srebrenica.”

For analysis that the group targeted was “substantial,” see Section (III)(c)(iii)(6)(f), ICTY Digest.

For additional holdings in the *Krstić* case, see Section (III)(d)(i), ICTY Digest.

iii) “in whole or in part”

Krstić, (Trial Chamber), August 2, 2001, para. 584: “[A]ny act committed with the intent to destroy a part of a group, as such, constitutes an act of genocide within the meaning of the [Genocide] Convention.”

(1) must be intent to destroy a distinct part of the group, not isolated individuals within it

Brđjanin, (Trial Chamber), September 1, 2004, para. 700: “[I]n the Genocide Convention, the terms ‘in whole or in part’ speak to the intended scope of destruction, as opposed to the actual destruction of the group. It is clear from the terms of the Genocide Convention that ‘any act committed with intent to destroy a part of a group, as such, constitutes an act of genocide within the meaning of the Convention.’ The Trial Chamber agrees with the *Krstić* and *Stakić* Trial Chambers that ‘the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it.’”

Stakić, (Trial Chamber), July 31, 2003, para. 524: “This Trial Chamber concurs with the Trial Chamber in *Krstić* which held that ‘the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it.’ Furthermore,

Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.”

Krstić, (Trial Chamber), August 2, 2001, para. 590: “[T]he intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. . . .”

(2) “substantial” part of group required

Krstić, (Appeals Chamber), April 19, 2004, paras. 8-9: “It is well established that where a conviction for genocide relies on the intent to destroy a protected group ‘in part,’ the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.”

“The question has also been considered by Trial Chambers of the ICTR, whose Statute contains an identical definition of the crime of genocide. These Chambers arrived at the same conclusion. In *Kayishema*, the Trial Chamber concluded, after having canvassed the authorities interpreting the Genocide Convention, that the term “in part” requires the intention to destroy a considerable number of individuals who are part of the group.’ This definition was accepted and refined by the Trial Chambers in *Bagilishema* and *Semanzaza*, which stated that the intent to destroy must be, at least, an intent to destroy a substantial part of the group.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 668: “The Appeals Chamber [in *Krstić*] has held that the term ‘in whole or in part’ must be interpreted as requiring that

‘the alleged perpetrator intended to destroy at least a substantial part of the protected group.’”

Brdjanin, (Trial Chamber), September 1, 2004, para. 701: “In the *Krstic* case, the Appeals Chamber held that ‘[t]he intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.’ It further stated that ‘the substantiality requirement both captures genocide’s defining character as a crime of massive proportions and reflects the Convention’s concern with the impact the destruction of the targeted part will have on the overall survival of the group.’”

Krstic, (Trial Chamber), August 2, 2001, para. 634: “[A]n intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”

Jelisić, (Trial Chamber), December 14, 1999, para. 82: “[I]t is widely acknowledged that the intention to destroy must target at least a *substantial part* of the group.”

See also Krstic, (Appeals Chamber), April 19, 2004, paras. 10-11 (discussing the sources of the “substantial part” requirement, including Raphael Lemkin, who coined the term genocide and was instrumental in drafting the Genocide Convention).

(3) factors for assessing whether group is substantial

Krstic, (Appeals Chamber), April 19, 2004, paras. 12, 14: “The intent requirement of genocide under Article 4 of the Statute is . . . satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.” “These considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 668: “The Appeals Chamber [in *Krstic*] has specified that ‘the numeric size of the targeted part of the group,’ which

should be evaluated not only in absolute terms but also in relation to the overall size of the entire group, as well as 'the prominence' within the group of the targeted portion, are among the factors to consider when determining whether the targeted part is substantial enough to meet this requirement. The Appeals Chamber further found that '[t]he intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 702: “According to the Appeals Chamber [in *Krstić*], the determination of when the targeted group is substantial enough to meet this requirement may involve a number of considerations, including but not limited to: the numeric size of the targeted part of the group - measured not only in absolute terms but also in relation to the overall size of the entire group -, the prominence within the group of the targeted part of the group, and the area of the perpetrators’ activity and control as well as the possible extent of their reach. The Appeals Chamber has held that “[t]he applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.”

(4) evidence of destruction of leadership may establish intent to destroy “in part”

Brđjanin, (Trial Chamber), September 1, 2004, para. 703: “The Trial Chamber . . . notes that according to the jurisprudence of the Tribunal, the intent to destroy a group may, in principle, be established if the destruction is related to a significant section of the group, such as its leadership. The Appeals Chamber [in *Krstić*] has stated that “[p]roperly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied.” See also *Stakić*, (Trial Chamber), July 31, 2003, para. 525 (similar).

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), September 3, 2001, paras. 76-77: “[T]he intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership.” “[T]he requisite intent may be inferred from the ‘desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.’ The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such.”

Jelisić, (Trial Chamber), December 14, 1999, para. 82: “Genocidal intent may . . . be manifest in two forms. It may consist of desiring the extermination of a very large

number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected [*i.e.* leadership of the group] for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group 'selectively.'"

(5) destruction may be limited to a geographical zone

Brđjanin, (Trial Chamber), September 1, 2004, para. 703: "[T]he jurisprudence of the Tribunal supports the approach that permits a characterisation of genocide even when the specific intent to destroy a group, in part, extends only to a limited geographical area."

Stakić, (Trial Chamber), July 31, 2003, para. 523: "In construing the phrase 'destruction of a group in part,' the Trial Chamber with some hesitancy follows the jurisprudence of the Yugoslavia and Rwanda Tribunals which permits a characterisation of genocide even when the specific intent extends only to a limited geographical area, such as a municipality. The Trial Chamber is aware that this approach might distort the definition of genocide if it is not applied with caution."

Krstić, (Trial Chamber), August 2, 2001, para. 590: "[T]he physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue."

Jelisić, (Trial Chamber), December 14, 1999, para. 83: "[I]t is accepted that genocide may be perpetrated in a limited geographic zone." The geographical zone in which an attempt to eliminate the group is made may be "limited to the size of a region or . . . a municipality."

See also Krstić, (Appeals Chamber), April 19, 2004, para. 13: "The historical examples of genocide . . . suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis."

(6) application—substantial part of group

**(i) targeting the 40,000 Bosnian Muslims of Srebrenica
was a substantial part of the targeted group**

Krstić, (Appeals Chamber), April 19, 2004, paras. 15-18, 673: “In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS [Army of Republika Srpska] Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. . . . The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size. As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted. The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.”

“In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the ‘safe areas’ established by the UN Security Council in Bosnia. By 1995 it had received significant attention in the international media. In its resolution declaring Srebrenica a safe area, the Security Council announced that it ‘should be free from armed attack or any other hostile act.’ This guarantee of protection was reaffirmed by the commander of the UN Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops. The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.”

“Finally, the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia,

the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control.” “In fact, the Defence does not argue that the Trial Chamber’s characterization of the Bosnian Muslims of Srebrenica as a substantial part of the targeted group contravenes Article 4 of the Tribunal’s Statute.”

“The Trial Chamber finds that in the present case the targeted group was the Bosnian Muslims of Srebrenica – a substantial part of the Bosnian Muslim group.”

For discussion of “groups protected by Article 4,” see Section (III)(c)(iv)(1), ICTY Digest.

For findings that the Bosnian Muslims constituted a protected group, see Section (III)(c)(iv)(1)(h), ICTY Digest.

(ii) the Bosnian Muslims and Bosnian Croats of the municipalities of the Autonomous Region of Krajina constituted a substantial part of the Bosnian Muslim and Bosnian Croat groups in Bosnia-Herzegovina

Brđanin, (Trial Chamber), September 1, 2004, para. 967: Where the targeted parts of the groups were the Bosnian Muslims and Bosnian Croats of the Autonomous Region of Krajina, and there were 2,162,426 Bosnian Muslims and 795,745 Bosnian Croats in Bosnia-Herzegovina according to a 1991 census, and there were 233,128 Bosnian Muslims and 63,314 Bosnian Croats living in the relevant . . . municipalities, the Bosnian Muslims and Bosnian Croats of the . . . municipalities [of the Autonomous Region of Krajina] constituted “a substantial part, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in Bosnia-Herzegovina.” “The Trial Chamber is satisfied that, in targeting the Bosnian Muslims and Bosnian Croats of the [Autonomous Region of Krajina], the perpetrators intended to target at least substantial parts of the protected groups.”

iv) “a national, ethnical, racial or religious group, as such”

(1) groups protected by Article 4

(a) national, ethnical, racial or religious groups

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 667: “Article 4 of the Statute protects national, ethnical, racial or religious groups.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 512 (same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 682: “The Genocide Convention and, correspondingly, Article 4 of the Statute, protects national, ethnical, racial or religious groups. These groups are not clearly defined in the Genocide Convention or elsewhere. The Trial Chamber agrees with the *Krstić* Trial Chamber that:

[t]he preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as ‘national minorities,’ rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.”

Krstić, (Trial Chamber), August 2, 2001, para. 554: “[T]he Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial or religious groups.”

(b) not political groups

Jelisić, (Trial Chamber), December 14, 1999, para. 69: “Article 4 of the Statute . . . excludes members of political groups. The preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting ‘stable’ groups objectively defined and to which individuals belong regardless of their own desires.”

(c) destroying culture and identity insufficient, but can help show intent to destroy

Krstić, (Appeals Chamber), April 19, 2004, para. 25: “[A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.”

Krstić, (Trial Chamber), August 2, 2001, para. 580: “[A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. [W]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”

See also “must intend/seek physical or biological destruction,” Section (III)(c)(ii)(7), ICTY Digest.

(d) evaluate protected group on a case-by-case basis using objective and subjective criteria

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 667: “The Trial Chamber finds that the correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 684: “The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must be in fact directed against ‘members of the group.’”

(e) group may be identified by stigmatization of the group

Brđjanin, (Trial Chamber), September 1, 2004, para. 683: “In accordance with the jurisprudence of the Tribunal, the relevant protected group may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.”

Jelšić, (Trial Chamber), December 14, 1999, para. 70: “Although the objective determination of a religious group still remains possible . . . , it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber . . . elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.”

(f) group may not be identify based on negative criteria

Brđjanin, (Trial Chamber), September 1, 2004, para. 685: “[T]he Trial Chamber agrees with the *Stakić* Trial Chamber that, ‘[i]n cases where more than one group is targeted, it is not appropriate to define the group in general terms, as for example, “non-Serbs.”’ It follows that the Trial Chamber disagrees with the possibility of identifying the relevant group by exclusion, *i.e.*: on the basis of ‘negative criteria.’”

Stakić, (Trial Chamber), July 31, 2003, para. 512: “In cases where more than one [protected] group is targeted, it is not appropriate to define the group in general terms,

as, for example, ‘non-Serbs.’ In this respect, the Trial Chamber does not agree with the ‘negative approach’ taken by the Trial Chamber in *Jelisić*:

A ‘negative approach’ would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.”

But see Jelisić, (Trial Chamber), December 14, 1999, para. 71: “A group may be stigmatised in this manner by way of positive or negative criteria. A ‘positive approach’ would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A ‘negative approach’ would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. In this case, it is the positive approach towards a group which has been advanced by the prosecution.”

(g) where more than one group targeted, consider each group separately

Brdjanin, (Trial Chamber), September 1, 2004, para. 686: “[W]here more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately.”

Stakić, (Trial Chamber), July 31, 2003, para. 512: “[A] targeted group may be distinguishable on more than one basis and the elements of genocide must be considered in relation to each group separately, e.g. Bosnian Muslims and Bosnian Croats.”

(h) application—Bosnian Muslims were protected group

Krstić, (Appeals Chamber), April 19, 2004, para. 6: “The Indictment in this case alleged, with respect to the count of genocide, that Radislav Krstić ‘intend[ed] to destroy a part of the Bosnian Muslim people as a national, ethnical, or religious group.’ The targeted group identified in the Indictment, and accepted by the Trial Chamber, was that of the Bosnian Muslims. The Trial Chamber determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by Article 4.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 667: “The Trial Chamber finds that the Bosnian Muslim people is [*is*] a protected group under Article 4 of the Statute.”

Stakić, (Trial Chamber), July 31, 2003, para. 545: “The Trial Chamber finds that the majority of victims of acts potentially falling under Article 4(2) (a) to (c) of the Statute belong to the Bosnian Muslim group. Some evidence has also been presented of similar crimes committed against Bosnian Croats. However, the number of Croats in the Municipality of Prijedor was limited and the Trial Chamber finds that the evidence of crimes committed against Croats has been insufficient to allow it to conclude that the Bosnian Croat group was separately targeted.”

(2) “as such”

(a) victims must be targeted by reason of their group membership

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 669: “The victims of the crime must be targeted because of their membership in the protected group, although not necessarily solely because of such membership.”

Stakić, (Trial Chamber), July 31, 2003, para. 521: “The group must be targeted because of characteristics peculiar to it, and the specific intent must be to destroy the group as a separate and distinct entity. As the Trial Chamber in *Sikirica* pointed out:

Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.”

Krstić, (Trial Chamber), August 2, 2001, para. 561: “[T]he victims of genocide must be targeted *by reason* of their membership in a group. . . . The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victims’ membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such.”

Jelisić, (Trial Chamber), December 14, 1999, para. 67: “The special intent which characterises genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the ‘membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide.’”

(b) the group must be targeted, not specific individuals

Sikirica et al., (Trial Chamber), September 3, 2001, para. 89: “The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase ‘as such’ in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. This is what differentiates genocide from the crime against humanity of persecution. Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds.”

Krstić, (Trial Chamber), August 2, 2001, para. 551: “[G]enocide must target not only one or several individuals but a group as such.”

Jelisić, (Trial Chamber), December 14, 1999, para. 79: “[T]he intention must be to destroy the group ‘as such,’ meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.’ By killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member.”

(3) distinguishing genocide from persecution—where victims are targeted because of group membership, but there is not necessarily an intent to destroy the group as such

Brđjanin, (Trial Chamber), September 1, 2004, para. 699: “The intent to destroy makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such.”

d) Application—genocide

i) Srebrenica massacre was genocide (*Krstić* case)

Krstić, (Appeals Chamber), April 19, 2004, paras. 35, 37-38: “In this case, the factual circumstances, as found by the Trial Chamber, permit the inference that the killing of the Bosnian Muslim men [after the fall of Srebrenica] was done with genocidal intent. As already explained, the scale of the killing, combined with the VRS [Army of Republica Srpska] Main Staff’s awareness of the detrimental consequences it would have

for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise, is a sufficient factual basis for the finding of specific intent. The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims."

"The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act." "In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber did not depart from the legal requirements for genocide."

(1) application—inferring genocidal intent—proper to consider the long-term impact that the elimination of the men would have on the survival of the community

Krstić, (Appeals Chamber), April 19, 2004, paras. 28-29: "The Trial Chamber was . . . entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community. In examining these consequences, the Trial Chamber properly focused on the likelihood of the community's physical survival. As the Trial Chamber found, the massacred men amounted to about one fifth of the overall Srebrenica community. The Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of

such a sizeable number of men would ‘inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.’ Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.”

“This is the type of physical destruction the Genocide Convention is designed to prevent. The Trial Chamber found that the Bosnian Serb forces were aware of these consequences when they decided to systematically eliminate the captured Muslim men. The finding that some members of the VRS [Army of Republica Srpska] Main Staff devised the killing of the male prisoners with full knowledge of the detrimental consequences it would have for the physical survival of the Bosnian Muslim community in Srebrenica further supports the Trial Chamber’s conclusion that the instigators of that operation had the requisite genocidal intent.”

(2) application—inferring genocidal intent—targeting of military-aged men not driven solely by military rationale

Krstić, (Appeals Chamber), April 19, 2004, paras. 26-27: “The Trial Chamber rejected the Defence’s argument that the killing of [military aged] men was motivated solely by the desire to eliminate them as a potential military threat. The Trial Chamber based this conclusion on a number of factual findings, which must be accepted as long as a reasonable Trial Chamber could have arrived at the same conclusions. The Trial Chamber found that, in executing the captured Bosnian Muslim men, the VRS [Army of Republica Srpska] did not differentiate between men of military status and civilians. Though civilians undoubtedly are capable of bearing arms, they do not constitute the same kind of military threat as professional soldiers. The Trial Chamber was therefore justified in drawing the inference that, by killing the civilian prisoners, the VRS did not intend only to eliminate them as a military danger. The Trial Chamber also found that some of the victims were severely handicapped and, for that reason, unlikely to have been combatants. This evidence further supports the Trial Chamber’s conclusion that the extermination of these men was not driven solely by a military rationale.”

“Moreover, as the Trial Chamber emphasized, the term ‘men of military age’ was itself a misnomer, for the group killed by the VRS included boys and elderly men normally considered to be outside that range. Although the younger and older men could still be capable of bearing arms, the Trial Chamber was entitled to conclude that they did not present a serious military threat, and to draw a further inference that the VRS decision to kill them did not stem solely from the intent to eliminate them as a threat. The killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent.”

Compare Brjanin, (Trial Chamber), September 1, 2004, para. 979 (targeting of military-aged men suggested no genocidal intent), discussed at Section (III)(d)(iii)(2), ICTY Digest.

(3) application—inferring genocidal intent—forcible transfer

Krstić, (Appeals Chamber), April 19, 2004, paras. 24, 31, 33: “The Trial Chamber, the Defence submits, impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.”

“As the Trial Chamber explained, forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself. The decision not to kill the women or children may be explained by the Bosnian Serbs’ sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure.”

“The Trial Chamber - as the best assessor of the evidence presented at trial - was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS [Army of Republica Srpska] Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of ‘other culpable acts systematically directed against the same group.’”

Krstić, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, para. 35: “[S]tanding alone, forcible transfer is not genocide. But in this case the transfer did not stand alone, and that indeed is the basis on which the Appeals Chamber rejected the defence argument that it showed that there was no genocide. It was part – an integral part – of one single scheme to commit genocide, involving killings, forcible transfer and destruction of homes. In particular, it showed that the intent with which the killings were done was indeed to destroy the Srebrenica part of the Bosnian Muslim group.”

See also Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 660-661, 675, where the Trial Chamber found that forcible transfer was evidence of specific intent to commit genocide, discussed at Section (III)(d)(ii)(1), ICTY Digest.

Compare Brdjanin, (Trial Chamber), September 1, 2004, paras. 975, 976, where the Trial Chamber found mass deportation insufficient as evidence of special intent to commit genocide, discussed, Section (III)(d)(iii)(1), ICTY Digest.

For discussion of the holding that Krstic was responsible as an aider and abettor of genocide, but not as a principal perpetrator, see, under Article 7.1, “application – aiding and abetting” “genocide at Srebrenica,” Section (V)(d)(viii)(1), ICTY Digest.

ii) Srebrenica massacre was genocide (*Blagojevic and Jokic* case)

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 674, 676-677: “The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the ‘Krivaja 95’ operation, the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there. The forcible transfer was an integral part of this operation, which also included killings and destruction of properties. The Bosnian Serb forces separated the able-bodied men in Potocari, and captured those in the column heading to Tuzla, regardless of their military or civilian status. The separation of the men from the rest of the Bosnian Muslim population shows the intent to segregate the community and ultimately to bring about the destruction of the Bosnian Muslims of Srebrenica. The Bosnian Muslim men were stripped of their personal belongings and identification, detained, and finally taken to execution sites, where the Bosnian Serb forces deliberately and systematically killed them, solely on the basis of their ethnicity.”

“In such a context, the killings in Bratunac town were also a manifestation of this intent to destroy the group. It had an impact on the Bosnian Muslim group beyond the death of the men killed; it sent a message to the remaining members of the group of their fate – that they were at the mercy of the Bosnian Serbs and that their lives, too, could be taken at any moment.”

“The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group.”

(1) application—inferring genocidal intent—forcible transfer

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 660-661, 675: “In relation to forcible transfer, Judge Shahabuddeen [in the *Krstic* case] found that ‘mere displacement’ does not amount to genocide. However, he further found that

displacement can constitute genocide when the consequence is dissolution of the group. Furthermore, he found that in the *Krstic* case,

[...] there was more than mere displacement. The killings, together with a determined effort to capture others for killing, the forced transportation or exile of the remaining population, and the destruction of homes and places of worship, constituted a single operation which was executed with intent to destroy a group in whole or in part within the meaning of the chapeau to paragraph 2 of article 4 of the Statute.”

“The Trial Chamber observes, moreover, that the majority of the *Krstic* Appeals Chamber, held that:

[...] forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby *eliminating even the residual possibility that the Muslim community in the area could reconstitute itself.*”

(emphasis added by Blagojevic and Jokic Trial Chamber)

“Immediately before and during these massacres, the remainder of the Bosnian Muslim population of Srebrenica was forcibly transferred to Bosnian Muslim-held territory. The forcible transfer of the women, children and elderly is a manifestation of the specific intent to rid the Srebrenica enclave of its Bosnian Muslim population. The manner in which the transfer was carried out – through force and coercion, by not registering those who were transferred, by burning the houses of some of the people, sending the clear message that they had nothing to return to, and significantly, through its targeting of literally the entire Bosnian Muslim population of Srebrenica, including the elderly and children – clearly indicates that it was a means to eradicate the Bosnian Muslim population from the territory where they had lived.”

See also Krstic, (Appeals Chamber), April 19, 2004, paras. 24, 31, 33, where the Appeals Chamber accepted that forcible transfer was evidence of specific intent to commit genocide, discussed at Section (III)(d)(i)(3), ICTY Digest.

Compare Brdjanin, (Trial Chamber), September 1, 2004, paras. 975, 976, where the Trial Chamber found mass deportation insufficient as evidence of special intent to commit genocide, discussed, Section (III)(d)(iii)(1), ICTY Digest.

**iii) removal of Bosnian Muslims and Bosnian Croats from the
Autonomous Region of Krajina not genocide**

**(1) application—inferring genocidal intent—mass deportations
insufficient as evidence of special intent to commit genocide
where there was an extremely high number of individuals
displaced compared to the number of individuals killed**

Brdjanin, (Trial Chamber), September 1, 2004, paras. 975, 976: “Although the Prosecution repeatedly acknowledged that the ‘mass deportation is not relied upon in this case as a genocidal act, but only as evidence that the Accused intended to destroy the Bosnian Muslim and Bosnian Croat groups in the [Autonomous Region of Krajina],’ when assessing the size of the victimised parts of the Bosnian Muslim and Bosnian Croat groups, it repeatedly took into consideration and referred to the ‘sheer’ numbers of Bosnian Muslims and Bosnian Croats who were ‘forcibly transferred.’ The Trial Chamber acknowledges that, whilst forcible displacement does not constitute in and of itself a genocidal act, it does not preclude a Trial Chamber from relying on it as evidence of intent. But in the Trial Chamber’s view it is not appropriate to rely on it as evidence of the actual destruction of the targeted parts of the protected groups, since that would in effect mean the consideration, as it were through the back door, of forcible displacement as an underlying act.”

“On the subject of forcible displacement, the Trial Chamber finds, in accordance with the stated views of the Appeals Chamber, that forcible displacement could be an additional means to ensure the physical destruction, in this case of the Bosnian Muslim and Bosnian Croat groups of the [Autonomous Region of Krajina]. The Appeals Chamber has also stated, however, that the existence of the specific intent required for the crime of genocide must be supported by the factual matrix. The extremely high number of Bosnian Muslim and Bosnian Croat men, women and children forcibly displaced from the [Autonomous Region of Krajina] in this case, particularly when compared to the number of Bosnian Muslims and Bosnian Croats subjected to the acts enumerated in Article 4(2)(a), (b) and (c), does not support the conclusion that the intent to destroy the groups in part, as opposed to the intent to forcibly displace them, is the only reasonable inference that may be drawn from the evidence.”

Compare Krstić, (Appeals Chamber), April 19, 2004, paras. 24, 31, 33, where the Appeals Chamber accepted that forcible transfer was evidence of specific intent to commit genocide, discussed at Section (III)(d)(i)(3), ICTY Digest.

Compare Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 660-661, 675, where the Trial Chamber accepted that forcible transfer was evidence of specific intent to commit genocide, discussed at Section (III)(d)(iii)(1), ICTY Digest.

(2) application—inferring genocidal intent—targeting of military-aged men suggested no genocidal intent

Brđjanin, (Trial Chamber), September 1, 2004, para. 979: “[T]he victims of the underlying acts in Article 4(2)(a) to (c), particularly in camps and detention facilities, were predominantly, although not only, military-aged men. This additional factor could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence. There is an alternative explanation for the infliction of these acts on military-aged men, and that is that the goal was rather to eliminate any perceived threat to the implementation of the Strategic Plan in the [Autonomous Region of Krajina] and beyond. Security for the Bosnian Serbs seems to have been the paramount interest. In the words of one witness: ‘the aim was to reduce the threat to the detainee, the detainee’s community, and anyone [...] who looked as if they would fight, once sent to the other side, would be eligible for detention.’”

Compare Krstić, (Appeals Chamber), April 19, 2004, paras. 26-27 (targeting of military-aged men supported “the inference that their extermination was motivated by a genocidal intent”), discussed at Section (III)(d)(i)(2), ICTY Digest.

(3) application—inferring genocidal intent—the existence of a plan or policy

Brđjanin, (Trial Chamber), September 1, 2004, para. 981: “The Trial Chamber has already addressed the political agenda of the Bosnian Serb leadership, in the context of which it has identified the Strategic Plan. The Strategic Plan contained elements that denote its genocidal potential. ‘The project of an ethnically homogenous state formulated against the backdrop of mixed populations necessarily envisages the exclusion of any group not identified with the Serbian one.’ The exclusion was to be achieved by the use of force and fear against any such group. In addition, there are obvious similarities between a genocidal policy and the policy commonly known as ethnic cleansing. The underlying criminal acts for each may often be the same. For the reasons stated above, however, it is not possible to conclude from the evidence that this potential materialised in the territory of the [Autonomous Region of Krajina] in the period relevant to the Indictment. While the Trial Chamber is satisfied that the Strategic Plan was to link Serb-populated areas in [Bosnia-Herzegovina] together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs

would be permanently removed, and that force and fear were used to implement it, it is not possible to conclude from the evidence actually brought forth in the instant case that there was an intention to do so by destroying the Bosnian Muslim and Bosnian Croat groups of the [Autonomous Region of Krajina]. The Trial Chamber stresses that it is only on the basis of the evidence in this concrete case, temporally and geographically limited, that it reaches the conclusion that genocidal intent is not the only reasonable inference that may be drawn from the Strategic Plan.” See *Brdjanin*, (Trial Chamber), September 1, 2004, para. 65 (the “Strategic Plan” consisted of “the Bosnian Serb leadership, including the members of the Main Board of the [Serbian Democratic Party] and other members of the [Serbian Democratic Party], as well as Bosnian Serb representatives of the armed forces, form[ing] a plan to link Serb-populated areas in [Bosnia and Herzegovina] together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed . . .”).

(4) application—inferring genocidal intent—the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct

Brdjanin, (Trial Chamber), September 1, 2004, paras. 983, 984: “The evidence shows a consistent, coherent and criminal strategy of cleansing the [Autonomous Region of Krajina] of Bosnian Muslims and Bosnian Croats implemented by the Bosnian Serb forces.” “While the general and widespread nature of the atrocities committed is evidence of a campaign of persecutions, the Trial Chamber holds that, in the circumstances of this case, it is not possible to conclude from it that the specific intent required for the crime of genocide is satisfied.”

(5) application—inferring genocidal intent—utterances of the accused

Brdjanin, (Trial Chamber), September 1, 2004, paras. 986, 987: “In his utterances, the Accused openly derided and denigrated Bosnian Muslims and Bosnian Croats. He also stated publicly that only a small percentage of them could remain in the territory of the [Autonomous Region of Krajina]. Some of the Accused’s utterances are openly nasty, hateful, intolerable, repulsive and disgraceful. On one occasion, speaking in public of mixed marriages, he remarked that children of such marriages could be thrown in the Vrbas River, and those who would swim out would be Serbian children. On another occasion, he publicly suggested a campaign of retaliatory ethnicity-based murder, declaring that two Muslims would be killed in Banja Luka for every Serbian killed in Sarajevo.” “Whilst these utterances strongly suggest the Accused’s discriminatory intent, however, they do not allow for the conclusion that the Accused harboured the intent to

destroy the Bosnian Muslims and Bosnian Croats of the [Autonomous Region of Krajina].”

iv) killings in Prijedor (including at Omarska, Keraterm and Trnopolje camps), not genocide

Stakic, (Trial Chamber), July 31, 2003, paras. 544, 546: “Crimes were committed on a massive scale throughout the municipality of Prijedor during the time period covered by the Fourth Amended Indictment, i.e. from 30 April 1992 to 30 September 1992. As set out in the Trial Chamber’s factual findings, killings occurred frequently in the Omarska, Keraterm and Trnopolje camps and other detention centres. Similarly, many people were killed during the attacks by the [Army of Republika Srpska] on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place. The thousands of persons who were detained in the camps were subjected to inhuman and degrading treatment, including routine beatings. Moreover, rapes and sexual assaults were committed at some of these facilities. Detainees were given little more than a subsistence diet. In addition, Bosnian Muslims who had lived their whole lives in the municipality of Prijedor were expelled from their homes. Bosnian Muslims were discriminated against in employment, e.g. by arbitrary dismissals, their houses were marked for destruction, and in many cases were destroyed along with mosques and Catholic churches. The Prosecution relies upon these events in Prijedor municipality in 1992 in their totality as being the *actus reus* for genocide under Article 4(2) (a) to (c) of the Statute.” “The Trial Chamber has reviewed its factual findings in Part II of this Judgement and a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 emerges that has been proved beyond reasonable doubt.”

(1) application—inferring genocidal intent—insufficient evidence of genocidal intent of higher level perpetrators presented in the *Stakic* case

Stakic, (Trial Chamber), July 31, 2003, paras. 547, 551: “Dr. Stakic is charged with participating in a genocidal campaign in the Municipality of Prijedor, allegedly organised at the highest level of the Serbian Republic, the seeds of which were sown around the time of the constitutive Session of the Assembly of the Serbian People of Bosnia and Herzegovina on 24 October 1991. He is charged with acting in concert with Milan Kovacevic and Simo Drljaca of the Prijedor Crisis Staff, Radoslav Broanin, General Momir Talic and Stojan Zupljanin of the [Autonomous Region of Krajina] Crisis Staff, and Radovan Karadic, Momcilo Krajisnik and Biljana Plavsic, members of the leadership of the Serbian Republic and the [Serbian Democratic Party]. In its Decision on 98 *bis* Motion to Acquit, the Trial Chamber concluded that on the basis of the evidence presented by the Prosecution, a reasonable Trial Chamber ‘could conclude that Dr. Stakic

shared the plans to create a unified Serbian state by destroying other ethnic groups.’ Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakic to enable it to draw the inference that those perpetrators had the specific genocidal intent. As a consequence, the Trial Chamber is unable to draw any inference from the vertical structure that Dr. Stakic shared the intent.” (emphasis in original)

“The Trial Chamber stresses that it is only on the basis of the evidence in this concrete case that it reaches the conclusion that a genocidal intent on a higher level has not been proved beyond reasonable doubt. This is despite the fact that there are a number of indicia that could point in the direction of such an intent which the Trial Chamber attempted to explore further by calling additional witnesses *proprio motu* under Rule 98.”

(2) application—inferring genocidal intent—insufficient evidence of intent to destroy part of group where approximately 23,000 persons registered to have passed through Trnopolje camp and 3000 killed in Prijedor

Stakic, (Trial Chamber), July 31, 2003, para. 553: “In relation to ‘killing members of the group’ the Trial Chamber is not satisfied that Dr. Stakic possessed the requisite *dolus specialis* for genocide, but leaves open the question whether he possessed the *dolus eventualis* for killings which may be sufficient to satisfy the subjective elements of other crimes charged in the Indictment. While the Trial Chamber is satisfied that the common goal of the members of the [Serbian Democratic Party] in the Municipality of Prijedor, including Dr. Stakic as President of the Municipal Assembly, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group. The Trial Chamber believes that the goal was rather to eliminate any perceived threat, especially by Muslims, to the overall plan and to force non-Serbs to leave the Municipality of Prijedor. Security for the Serbs and protection of their rights seems to have been the paramount interest. As one member of the [European Community Monitoring Mission] delegation which visited Prijedor Municipality in late August 1992 pointed out, ‘the conclusion to be drawn from what we have seen is that the Muslim population is not wanted and is being systematically kicked out by whatever method is available.’ Had the aim been to kill all Muslims, the structures were in place for this to be accomplished. The Trial Chamber notes that while approximately 23,000 people were registered as having passed through the Trnopolje camp at various times when it was operational and through other suburban settlements, the total number of killings in Prijedor municipality probably did not exceed 3,000.” (emphasis in original)

(3) application—inferring genocidal intent—lack of evidence of hateful statements by the accused

Stakić, (Trial Chamber), July 31, 2003, para. 554: “Even though Dr. Stakić helped to wage an intense propaganda campaign against Muslims, there is no evidence of the use of hateful terminology by Dr. Stakić himself from which the *dolus specialis* could be inferred. Statements made by Dr. Stakić do not publicly advocate killings and while they reveal an intention to adjust the ethnic composition of Prijedor, the Trial Chamber is unable to infer an intention to destroy the Muslim group.” *See also Stakić*, (Trial Chamber), July 31, 2003, paras. 560, 561 (acquitting Stakić of genocide and complicity in genocide).

e) Underlying offenses

i) killing members of the group (Article 4(2)(a))

(1) “killing” equated with “murder”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 642: “In the jurisprudence of the Tribunal, the term ‘killings’ referred to under Article 4(2)(a) has been equated with murder.”

(2) killing must be of members of the protected group

Brđjanin, (Trial Chamber), September 1, 2004, para. 689: “The killing must be of members of the targeted national, ethnical, racial or religious group.”

(3) proof of result required

Brđjanin, (Trial Chamber), September 1, 2004, para. 688: “The acts in subparagraphs (a) and (b) of Article 4(2) require proof of a result.”

(4) *mens rea*—must be intentional but not necessarily premeditated

Stakić, (Trial Chamber), July 31, 2003, para. 515: “As regards the underlying acts, the word ‘killing’ is understood to refer to intentional but not necessarily premeditated acts.”

(5) application—killing

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 643: “The Prosecution alleges that over 7,000 Bosnian Muslim men were killed during the indictment period. The Trial Chamber has previously established this allegation as being proved beyond reasonable doubt.”

See also “Srebrenica massacre was genocide,” Section (III)(d)(i) and (ii), ICTY Digest.

ii) causing serious bodily or mental harm to members of the group (Article 4(2)(b))

(1) defined

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 645: “The term ‘serious bodily or mental harm’ is not defined in the Statute. The Trial Chamber in the *Kayishema and Ruzindana* case found that bodily harm refers to harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”

Krstić, (Trial Chamber), August 2, 2001, para. 513: “[S]erious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering.”

(2) harm need not be permanent or irremediable, but it must cause grave and long-term disadvantage/be serious

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 645: “The ‘Tribunals’ case-law has specified that the harm need not be permanent or irremediable, but ‘[i]t must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’ The *Semanza* Trial Judgement has specified that mental harm refers to more than minor or temporary impairment of mental faculties.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 690: “The harm inflicted need not be permanent and irremediable, but needs to be serious.” See also *Stakić*, (Trial Chamber), July 31, 2003, para. 516 (similar).

Krstić, (Trial Chamber), August 2, 2001, para. 513: “[S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”

(3) must assess on a case-by-case basis

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 646: “Whether an act constitutes ‘serious bodily or mental harm’ within the meaning of Article 4 of the Statute must be assessed on a case-by-case basis, with due regard for the particular circumstances of the case.”

(4) acts included

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 646: “Like the ICTR, this Tribunal has construed the term [serious bodily or mental harm] to include acts of torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and deportation. In particular, the *Krstic* Trial Chamber held that ‘inhuman treatment [...] and deportation are among the acts which may cause serious bodily or mental injury.’ It found support for this in the case law of this Tribunal as well as in other sources. The Eichmann Judgement rendered by the Jerusalem District Court on 12 December 1961 had already included ‘deportation’ among the acts that could constitute serious bodily or mental harm.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 690: “‘Causing serious bodily or mental harm’ in sub-paragraph (b) is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group.” See also *Stakic*, (Trial Chamber), July 31, 2003, para. 516 (similar).

Krstic, (Trial Chamber), August 2, 2001, para. 513: “[I]nhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.”

(5) proof of result required

Brđjanin, (Trial Chamber), September 1, 2004, para. 688: “The acts in subparagraphs (a) and (b) of Article 4(2) require proof of a result.”

(6) *mens rea*—the harm must be inflicted intentionally

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 645: “[T]he harm must be inflicted intentionally.” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 690 (same).

(7) application—causing serious bodily or mental harm to members of the group

(a) trauma and wounds suffered by individuals who survived Srebrenica mass executions constitute serious bodily and mental harm

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 647-649: “The Trial Chamber finds that there is sufficient evidence to establish beyond reasonable doubt that the trauma and wounds suffered by those individuals who managed to survive the [Srebrenica] mass executions does constitute serious bodily and mental harm. The fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends’ safety as well as for their own safety, is a traumatic experience from which one will not quickly – if ever – recover. Furthermore, the Trial Chamber finds that the men suffered mental harm having their identification documents taken away from them, seeing that they would not be exchanged as previously told, and when they understood what their ultimate fate was. Upon arrival at an execution site, they saw the killing fields covered of bodies of the Bosnian Muslim men brought to the execution site before them and murdered. After having witnessed the executions of relatives and friends, and in some cases suffering from injuries themselves, they suffered the further mental anguish of lying still, in fear, under the bodies - sometimes of relative or friends – for long hours, listening to the sounds of the executions, of the moans of those suffering in pain, and then of the machines as mass graves were dug.”

“The Trial Chamber recalls the testimony of Witness P-111, a survivor of the Petkovci Dam mass execution, who was badly injured and who managed to survive remaining in the same position among the bodies of the other dead men:

as others were being killed, I was praying that I be killed, too, because I was in terrible pain. [...] So I just thought that my mother would never know where I was, as I was thinking that I'd like to die.”

“The Trial Chamber is also aware that the men who were separated, detained, abused and subsequently killed suffered serious mental harm in that they knew what their fate was: the last sight that many of the victims saw was killing fields full of bodies of the Bosnian Muslim men brought to the execution site before them.”

(b) forced displacement of women, children, and elderly from Srebrenica was a traumatic experience which caused serious mental harm

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 650, 652-654: “[T]he Trial Chamber is convinced that the forced displacement of women, children, and elderly people was itself a traumatic experience, which, in the circumstances of this case, reaches

the requisite level of causing serious mental harm under Article 4(2)(b) of the Statute. The forced displacement began with the Bosnian Muslim population fleeing from the enclave after a five-day military offensive, while being shot at as they moved from Srebrenica town to Potocari in search of refuge from the fighting. Leaving their homes and possessions, the Bosnian Muslims did so after determining that it was simply impossible to remain safe in Srebrenica town. Upon arrival in Potocari, the Bosnian Muslim population did not find the refuge they were seeking; rather they found UNPROFOR [UN Protection Force in Bosnia] unable to provide the assistance they needed: [the Dutch Battalion of UNPROFOR] was woefully unprepared for the mass influx of people to its base. After months of having its supply convoys searched or blocked, it did not have adequate supplies of food, medicine or even water for the thousands of Bosnian Muslims who arrived. Furthermore, it did not have adequate space in which to keep 25,000 – 30,000 people protected from the heat, let alone a place to rest or to sleep. Next, the Bosnian Muslims watched helplessly as Potocari was overrun – and essentially over taken – by Bosnian Serb forces, including General Mladic. As the brutal separations began under the watchful eye of the Bosnian Serb forces and the abuse of the population became more widespread, particularly during the ‘night of terror,’ the Bosnian Muslims were terrified – and helpless. After their husbands, fathers and sons were taken from them, the Bosnian Muslim women felt even more vulnerable and afraid – afraid not only for their own safety, but especially that of their loved ones. Having left Srebrenica to escape from the Bosnian Serbs, the Bosnian Muslim population saw that they must move farther than Potocari to be safe. As they boarded the buses, without being asked even for their name, the Bosnian Muslims saw the smoke from their homes being burned and knew that this was not a temporary displacement for their immediate safety. Rather, this displacement was a critical step in achieving the ultimate objective of the attack on the Srebrenica enclave to eliminate the Bosnian Muslim population from the enclave.”

“The Trial Chamber has no doubt that the suffering of the women, children and elderly people who were cruelly separated from their loved and forcibly transferred, and the terrible consequences that this had on their life, reaches the threshold of serious mental harm under Article 4(2)(b) of the Statute. The Trial Chamber also finds that the level of mental anguish suffered by the women, children and elderly people who were forcibly displaced from their homes – in such a manner as to traumatise them and prevent them from ever returning – obliged to abandon their property and their belongings as well as their traditions and more in general their relationship with the territory they were living on, does constitute serious mental harm.”

“Finally, the Trial Chamber is aware that many of the survivors, who lost their relatives under the horrific circumstances described above, are still searching for the bodies of their loved ones and looking for any information which would establish with certainty whether they are dead, and, if so, the exact circumstances of their death. The

Trial Chamber is convinced that the mental harm suffered by these survivors reaches the required threshold to constitute serious mental harm.”

“The Trial Chamber therefore finds that there is sufficient evidence to establish beyond reasonable doubt that in the circumstances of this case forcible transfer constituted ‘serious mental harm’ within the meaning of Article 4(2)(b). The Trial Chamber also finds that the perpetrators intended that the forcible transfer, and the way it was carried out, would cause serious mental harm to the victims.”

iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Article 4(2)(c))

(1) group must be a protected group

Brđjanin, (Trial Chamber), September 1, 2004, para. 692: “The group upon which these conditions are inflicted must be a protected group under the terms of the Genocide Convention. Such conditions must be calculated to bring about the physical destruction of the targeted group in whole or in part and must be inflicted on it deliberately.”

(2) covers methods of destruction by which the perpetrator does not immediately kill group members, but which, ultimately, seek their physical destruction

Stakić, (Trial Chamber), July 31, 2003, para. 518: “The Trial Chamber in *Akayesu* held that the expression [calculated to bring about its physical destruction] ‘should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.’ The element of physical destruction is inherent in the word genocide itself, which is derived from the Greek ‘genos’ meaning race or tribe and the Latin ‘caedere’ meaning to kill. It must also be remembered that cultural genocide, as distinct from physical and biological genocide, was specifically excluded from the Convention against Genocide. The International Law Commission has commented:

As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word ‘destruction,’ which must be taken only in its material sense, its physical or biological sense.”

(3) examples of acts covered

Brđjanin, (Trial Chamber), September 1, 2004, para. 691: “The acts envisaged by this sub-paragraph include, but are not limited to, methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.” See also *Stakić*, (Trial Chamber), July 31, 2003, para. 517 (same).

(4) does not require proof of physical destruction in whole or in part of the targeted group

Brđjanin, (Trial Chamber), September 1, 2004, para. 691: “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ under sub-paragraph (c) does not require proof of the physical destruction in whole or in part of the targeted group.” See also *Stakić*, (Trial Chamber), July 31, 2003, para. 517 (similar).

However, for discussion of the special intent required for genocide, see generally (III)(c), ICTY Digest.

(5) whether deportation included

Brđjanin, (Trial Chamber), September 1, 2004, para. 693: “In its Rule 98bis Decision, the Trial Chamber decided that it would not entertain the Prosecution’s submission that ‘the mass deportation of the Bosnian Muslim and Bosnian Croat groups’ constituted conditions of life calculated to bring about their physical destruction within the meaning of Article 4(2)(c) of the Statute, because it was not pleaded in the Indictment. Nevertheless, this does not preclude the Trial Chamber from relying on it as evidence of specific intent. The genocidal intent may be inferred, amongst other facts, from evidence of “other culpable acts systematically directed against the same group.””

(6) application—deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

Brđjanin, (Trial Chamber), September 1, 2004, paras. 909-962: The Trial Chamber was satisfied beyond a reasonable doubt that conditions at the following camps and detention facilities were calculated to bring about the physical destruction of Bosnian Muslim and Bosnian Croat detainees and were inflicted deliberately: the Manjaca camp,

the Mlavke football stadium, the Bosanski Novi fire station, the Kotor Varos prison, the Omarska camp, the Keraterm camp, the Trnopolje camp, the Sloga shoe factory, the Betonirka factory garages, the Pribinic camp, and the Territorial defense building in Teslic municipality.

iv) imposing measures intended to prevent births within the group (Article 4(2)(d))

v) forcibly transferring children of one group to another group (Article 4(2)(e))

f) Punishable acts/modes of responsibility for committing genocide

i) genocide (Article 4(3)(a))

Brđanin, (Trial Chamber), September 1, 2004, para. 727: “The Trial Chamber regards genocide under Article 4(3)(a) as encompassing principal offenders, including but not limited to the physical perpetrators and to those liable pursuant to the theory of [joint criminal enterprise].”

Stakić, (Trial Chamber), July 31, 2003, para. 532: “The Trial Chamber has previously identified the perpetrators or co-perpetrators of genocide as those who devise the genocidal plan at the highest level and take the major steps to put it into effect. The perpetrator or co-perpetrator is the one who fulfils ‘a key co-ordinating role’ and whose ‘participation is of an extremely significant nature and at the leadership level.’ This Trial Chamber regards genocide under Article 4(3)(a) as usually limited to ‘perpetrators’ or ‘coperpetrators.’”

For discussion of individual and command responsibility, see Sections (V) and (VI), ICTY Digest.

For discussion that it would be more appropriate to plead command responsibility for genocide as a violation of Article 4(3)(a) (genocide) rather than Article 4(3)(c) (complicity), see *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, paras. 681-686.

ii) conspiracy to commit genocide (Article 4(3)(b))

iii) direct and public incitement to commit genocide (Article 4(3)(c))

Stakić, (Trial Chamber), July 31, 2003, para. 503: “In respect of genocide, the Trial Chamber regards instigating as the derogated mode of criminal liability insofar as the

direct and public incitement to commit genocide punishable under Article 4(3)(c) would take priority (*lex specialis derogat legi generali*).”

iv) attempt to commit genocide (Article 4(3)(d))

v) complicity to commit genocide (Article 4(3)(e))

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 678: “Complicity in genocide is listed under Article 4(3)(e) as a form of liability for the crime of genocide.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 776: “[C]omplicity is a form of criminal participation governed by the general principles of criminal law. Complicity has generally been broadly conceived as a form of secondary liability and as such, it covers various heads of responsibility listed under Article 7(1).” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 729 (same first sentence).

(1) complicity and accomplice liability generally have same meaning

Brđjanin, (Trial Chamber), September 1, 2004, para. 723: “‘Complicity’ and ‘accomplice liability’ have the same meaning and are used interchangeably.”

Stakić, (Trial Chamber), July 31, 2003, para. 531: “As pointed out by the Trial Chamber in *Semanza*, there is no material distinction between complicity in genocide and ‘the broad definition accorded to aiding and abetting.’”

Compare Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 777: “In [the] *Tadić* [Trial Judgment] the terms ‘participation’ and ‘complicity’ are used interchangeably.”

(a) complicity broader than just aiding and abetting

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 777: “The Appeals Chamber has acknowledged that complicity in genocide includes the notion of aiding and abetting in the planning, preparation or execution of a crime, as well as other forms of liability. In this regard, the ICTR, relying on the Rwandan criminal code, had distinguished three forms of liability under complicity in genocide, namely complicity by procuring means, complicity by knowingly aiding and abetting and complicity by instigation.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 729: “According to the jurisprudence of the Tribunal and of the ICTR, complicity in genocide under Article 4(3)(e) can consist of aiding and abetting genocide, although it is not to be excluded that there may be other acts which are not strictly aiding and abetting but which could amount to complicity. The Appeals Chamber has held that ‘the terms

“complicity” and “accomplice” may encompass conduct broader than aiding and abetting.”

(2) accomplice defined

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 776: “In the context of genocide, while the principal perpetrator has been defined as ‘one who fulfils “a key coordinating role” and whose “participation is of an extremely significant nature and at the leadership level,” the accomplice has been defined as someone who associates him or herself in the crime of genocide committed by another.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 727: “[A]n accomplice to genocide under Article 4(3)(e) is someone who associates him or herself in the crime of genocide committed by another.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 533 (same).

See also Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 777: “The accomplice ‘will also be responsible for all that naturally results from the commission of the act in question.”

(a) aiding and abetting genocide compared

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 777: “Aiding and abetting genocide refers to ‘all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.’” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 729 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 533 (same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 777: “The Trial Chamber in *Furundžija* found that the offence of aiding and abetting required the following elements: practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime.”

(3) Genocide Convention and customary international law provide for complicity regarding genocide

Brđjanin, (Trial Chamber), September 1, 2004, para. 724: “The Trial Chamber is satisfied that complicity as a form of participation comes within the Tribunal’s jurisdiction *rationae personae*. Complicity is one of the forms of criminal responsibility recognised by the general principles of criminal law, and in respect of genocide, it is also recognised in customary international law. The Genocide Convention, provisions of which reflect customary international law, explicitly envisages complicity in genocide as a punishable act in its Article III, which is in turn reproduced in Article 4(3) of the Statute. The law

providing for complicity in genocide was sufficiently accessible and foreseeable at the time the acts charged in the Indictment are alleged to have been committed.”

(4) whether complicity in genocide requires a showing of genocidal intent

Krstić, (Appeals Chamber), April 19, 2004, para 142: “[T]here is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group. Article 4 of the Statute is most naturally read to suggest that Article 4(2)’s requirement that a perpetrator of genocide possess the requisite ‘intent to destroy’ a protected group applies to all of the prohibited acts enumerated in Article 4(3), including complicity in genocide. There is also evidence that the drafters of the Genocide Convention intended the charge of complicity in genocide to require a showing of genocidal intent.” *See also Krstić*, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 60, 62-64, 66, 68 (discussing interrelationship between Article 4(3)(e) complicity in genocide and Article 7(1) aiding and abetting genocide).

Compare Brđjanin, (Trial Chamber), September 1, 2004, para. 730: “As stated, the meaning of complicity in genocide is governed by the general principles of criminal law. Complicity in genocide, where it consists of aiding and abetting genocide, does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group. In that case the Prosecution must prove beyond reasonable doubt ‘that an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender’s state of mind; it need not show that an accused shared the specific intent of the principal offender.’”

For further discussion of the mental state for aiding and abetting genocide, see under Article 7.1, aiding and abetting: “*mens rea* for aider and abettor of genocide,” Section (V)(d)(v)(7), ICTY Digest, and “aiding and abetting genocide—elements,” Section (V)(d)(vi), ICTY Digest.

(5) complicity in genocide requires that genocide be committed

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 638: “Complicity in genocide refers to the liability incurred by those who associate themselves in the *commission* of the crime, and does not encompass association in an attempt or any other preparatory act which does not result in the commission of the crime: complicity in genocide requires that genocide was committed.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 728: “Complicity in genocide under Article 4(3)(c) necessarily implies that genocide has been or is being committed.”

Stakić, (Trial Chamber), July 31, 2003, paras. 533-534: “Complicity . . . necessarily implies the existence of a principal offence. Stated otherwise, complicity in genocide is possible only where genocide actually has been or is being committed.” “An accused can thus be held liable only in respect of the alternative charge of complicity in genocide if the Trial Chamber is satisfied beyond reasonable doubt that genocide as such took place.”

(6) may be prosecuted for complicity where perpetrator of genocide has not been tried or identified

Brđjanin, (Trial Chamber), September 1, 2004, para. 728: “[A]n individual can be prosecuted for complicity in genocide even when the perpetrator of genocide has not been tried or even identified.”

Stakić, (Trial Chamber), July 31, 2003, para. 533: “[T]he Trial Chamber is aware that an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified and that the perpetrator and accomplice need not know each other.”

(7) may not be convicted of both genocide and complicity in genocide for the same acts

Brđjanin, (Trial Chamber), September 1, 2004, para. 728: “[A]n accused may not be convicted of genocide and complicity in genocide for the same acts.”

For discussion of “whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability,” see (V)(e)(viii), ICTY Digest.

(8) application—complicity in genocide

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 834: “Vidoje Blagojević has been convicted of complicity in genocide. While it has not been established that he had the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it has been established that he aided and abetted persons who did, knowing that such destruction was the intent of the crimes for which he gave assistance.”

vi) overlap between Article 4(3) and Article 7(1)

Krstić, (Appeals Chamber), April 19, 2004, paras. 138-139: “As the Trial Chamber observed, there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide. There is support for a position that Article 4(3) may be the more specific provision (*lex specialis*) in relation to Article 7(1). There is, however, also authority indicating that modes of participation enumerated in Article 7(1) should be read, as the Tribunal’s Statute directs, into Article 4(3), and so the proper characterization of such individual’s criminal liability would be that of aiding and abetting genocide.”

“The Appeals Chamber concludes that the latter approach is the correct one in this case. Article 7(1) of the Statute, which allows liability to attach to an aider and abettor, expressly applies that mode of liability to any ‘crime referred to in articles 2 to 5 of the present Statute,’ including the offence of genocide prohibited by Article 4. Because the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible. In this case, the two provisions can be reconciled, because the terms ‘complicity’ and ‘accomplice’ may encompass conduct broader than that of aiding and abetting. Given the Statute’s express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav Krstić’s responsibility is properly characterized as that of aiding and abetting genocide.” *See also Krstić*, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 60, 62-64, 66, 68 (discussing interrelationship between Article 4(3)(e) complicity in genocide and Article 7(1) aiding and abetting genocide).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 679: “As observed by the Appeals Chamber [in *Krstić*], ‘there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide.’ As a result, some heads of responsibility listed under Article 7(1) are necessarily included in those forms of liability listed in Article 4(3), or vice versa. As the heads of liability listed under Article 7(1) are often more specific and strictly delimited than those listed under Article 4(3), Article 7(1) may prove useful in characterising the accused’s form of participation with the required degree of specificity. The Appeals Chamber has found ‘that modes of participation in Article 7(1) should be read, as the Tribunal’s Statute directs, into Article 4(3).’ It based this finding on the text of Article 7(1), which includes the liability for an aider and

abettor, and expressly applies that mode of liability to any ‘crime referred to in articles 2 to 5 of the present Statute,’ including the offence of genocide prohibited by Article 4.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 725-726: “[T]he Trial Chamber notes that the term ‘accomplice’ is ‘a term of uncertain reference.’ In particular as concerns complicity in genocide, the distinction between several meanings is complicated by the coexistence in the Statute of Article 4(3) with Article 7(1). The *verbatim* incorporation of Article III of the Genocide Convention results in that the inchoate offences relating to genocide (conspiracy, direct and public incitement and attempt), as well as complicity in genocide, are included in the Statute for the purposes of genocide along with Article 7(1), the general provision dealing with individual criminal responsibility for all crimes within the jurisdiction of the Tribunal. In addition, whilst Article 4(3) follows the approach of distinguishing between principals and accomplices or accessories, Article 7(1) simply specifies the various modes of involvement in crimes without drawing a formal distinction between principals and accessories.”

“The Trial Chamber agrees that the most accurate description of the relationship between Article 4(3) and 7(1) of the Statute is the following:

[b]y incorporating Article 4(3) in the Statute, the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law. The consequence of this approach, however, is that *certain* heads of individual criminal responsibility in Article 4(3) overlap with those in Article 7(1).”

Stakić, (Trial Chamber), July 31, 2003, para. 531: “Noting the overlap between Articles 7(1) and 4(3), the Trial Chamber concluded that two approaches are possible. Article 4(3) can either be regarded as *lex specialis* in relation to Article 7(1) (*lex generalis*), or the modes of participation under Article 7(1) can be read into Article 4(3).”

For discussion of “Superior responsibility for genocide,” see Section (VI)(d), ICTY Digest.

IV) CRIMES AGAINST HUMANITY (ARTICLE 5)

a) Statute

ICTY Statute, Article 5:

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;

- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”

b) General elements

Limaj et al., (Trial Chamber), November 30, 2005, para. 181: “To qualify as crimes against humanity the acts of an accused must be part of a widespread or systematic attack ‘directed against any civilian population.’”

Limaj et al., (Trial Chamber), November 30, 2005, para. 181: “It is established in the jurisprudence of the Tribunal that the general elements required for the applicability of Article 5 of the Statute are that: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic; and (v) the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern (*i.e.* knowledge of the wider context in which his or her acts occur and knowledge that his or her acts are part of the attack).” *See also Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 541 (same five elements); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 130 (same five elements); *Galic*, (Trial Chamber), December 5, 2003, para. 140 (similar); *Simic, Tadic and Zarić*, (Trial Chamber), October 17, 2003, para. 37 (same five elements); *Stakic*, (Trial Chamber), July 31, 2003, para. 621 (same five elements); *Kunarac, Kovac, and Vukotic*, (Trial Chamber), February 22, 2001, para. 410 (same five elements).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 541: “Additionally, the Statute of the Tribunal requires that the crimes be ‘committed in armed conflict, whether international or internal in character.’ The Appeals Chamber has considered this requirement to be a jurisdictional requirement.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 130 (the crime must be “committed in an armed conflict, whether international or internal in character. . .”); *Galic*, (Trial Chamber), December 5, 2003, para. 139 (“For a crime to be adjudicated under Article 5 of the Statute (crimes against humanity), there are two prerequisites: that there was an armed conflict, and that the alleged criminal acts occurred during that armed conflict.”); *Stakic*, (Trial Chamber), July 31, 2003, para. 618 (“a jurisdictional requirement for the applicability of Article 5 is the existence of an armed conflict.”).

i) jurisdictional prerequisites

(1) the Statute requires that there be an armed conflict

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 83: “[T]he requirement [committed in armed conflict] contained in Article 5 of the Statute is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict” See also *Stakic*, (Trial Chamber), July 31, 2003, para. 570 (quoting same).

Tadic, (Appeals Chamber), July 15, 1999, para. 251: “The armed conflict requirement is satisfied by proof that *there was* an armed conflict. . . .” (emphasis in original)

Limaj et al., (Trial Chamber), November 30, 2005, para. 180: “A crime listed in Article 5 of the Statute constitutes a crime against humanity only when ‘committed in armed conflict.’” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 133 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 38 (similar); *Naketic and Martinovic*, (Trial Chamber), March 31, 2003, para. 233 (similar).

(a) the armed conflict may be international or internal

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 541: “[T]he Statute of the Tribunal requires that the crimes be ‘committed in armed conflict, whether international or internal in character.’ The Appeals Chamber has considered this requirement to be a jurisdictional requirement.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 134: “The armed conflict can be international as well as internal in nature.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 23: “Article 5 vests the International Tribunal with the competence to prosecute crimes against humanity ‘when committed in armed conflict, whether international or internal in character.’”

(b) armed conflict defined

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 56: “An ‘armed conflict’ is said to exist ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’” See also *Tadic*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70 (same).

Brdjanin, (Trial Chamber), September 1, 2004, para. 122: “It is settled in the jurisprudence of this Tribunal that an armed conflict exists ‘whenever there is resort to

armed forces between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.” See also *Stakić*, (Trial Chambers), July 31, 2003, para. 568 (same).

(2) the acts of the accused and the armed conflict must be linked geographically as well as temporally

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 83: “[T]he requirement [committed in armed conflict] contained in Article 5 of the Statute is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.” See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 38 (quoting same); *Stakić*, (Trial Chamber), July 31, 2003, para. 570 (quoting same).

Tadić, (Appeals Chamber), July 15, 1999, para. 251: “A nexus between the accused’s acts and the armed conflict is *not* required, as is . . . suggested by the [*Tadić* Trial] Judgment. The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.” (emphasis in original) See also *Galić*, (Trial Chamber), December 5, 2003, para. 139 (there must exist “. . . an armed conflict at the relevant time and place.”); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 23 (same as *Galić*).

Limaj et al., (Trial Chamber), November 30, 2005, para. 180: “A crime listed in Article 5 of the Statute constitutes a crime against humanity only when ‘committed in armed conflict.’ This requirement translates into a need for proof that there *was* an armed conflict at the relevant time and place, and that, objectively, the acts of the accused are linked geographically, as well as temporally, with the armed conflict. Proof of a nexus between the underlying crimes and the armed conflict is not required. Although the acts or omissions must be committed in the course of an armed conflict, the only nexus required is that between the acts of an accused and the attack on the civilian population . . .”

Brđjanin, (Trial Chamber), September 1, 2004, para. 133: “The Appeals Chamber in *Kunarac* held that this [requirement that crimes against humanity be committed in armed conflict] is not equivalent to the requirement contained in Article 3 of the Statute, where a ‘close relationship’ between the acts of the accused and the armed conflict is required. By contrast, according to the Appeals Chamber, the nexus with the armed conflict under

Article 5 is . . . ‘a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.’”¹⁴

Stakić, (Trial Chambers), July 31, 2003, para. 567: “Article 5 of the Statute confers jurisdiction on the Tribunal to prosecute persons for crimes against humanity. While the Appeals Chamber has held that ‘customary international law may not require a connection between crimes against humanity and any conflict at all,’ Article 5 imposes a jurisdictional requirement limiting the Tribunal’s jurisdiction to crimes against humanity ‘when committed in armed conflict, whether international or internal in character.’”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 33: “The Appeal Chamber [in *Tadić*] . . . concluded in respect of Article 5 of the Statute that proof of a nexus between the conduct of the accused and the armed conflict is not required. . . .” “Although the acts or omissions must be committed in the course of an armed conflict, the nexus which is required is between the accused’s acts and the attack on the civilian population.” See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 251: “A nexus with the accused’s acts is required . . . only for the attack on ‘any civilian population.’”

See also “the acts of the accused must form part of the attack” (element 2), Section (IV)(b)(iii), ICTY Digest.

ii) there must be an “attack” (element 1)

Limaj et al., (Trial Chamber), November 30, 2005, para. 181: “To show crimes against humanity, one element is “[t]here must be an attack.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 541 (same); *Brđanin*, (Trial Chamber), September 1, 2004, para. 130 (same); *Simić, Tadić and Zarić*, (Trial Chamber), October 17, 2003, para. 37 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 621 (same); *Kunarac, Kovac, and Vuković*, (Trial Chamber), February 22, 2001, para. 410 (same).

¹⁴ Most decisions use the word “nexus” to describe the relationship between the acts of the accused and the attack against the civilian population, not the armed conflict. See, e.g., *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 33 (“the nexus which is required is between the accused’s acts and the attack on the civilian population.”); see also “the acts of the accused must form part of the attack” (element 2), Section (IV)(b)(iii), ICTY Digest. Compare *Tadić*, (Appeals Chamber), July 15, 1999, para. 251 (“A nexus between the accused’s acts and the armed conflict is not required . . .”).

(1) defined

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 543: “‘Attack’ in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 131 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 141 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 233 (similar).

(2) “attack” and “armed conflict” are distinct

Tadić, (Appeals Chamber), July 15, 1999, para. 251: “[T]he two – the ‘attack on the civilian population’ and ‘the armed conflict’ – must be separate notions”

Limaj et al., (Trial Chamber), November 30, 2005, para. 182: “The concepts of ‘attack’ and ‘armed conflict’ are distinct and separate notions” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 131 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 623 (similar); *Vasiljević*, (Trial Chamber), November 29, 2002, para. 30 (similar).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 39: “The concepts of ‘attack’ and ‘armed conflict’ are necessarily separate and distinct, the former being an element of a crime against humanity and the latter a jurisdictional requirement pursuant to the Statute.”

Galic, (Trial Chamber), December 5, 2003, para. 141: “In comparing the content of customary international law concerning crimes against humanity to the Tribunal’s Statute, the Appeals Chamber noted that ‘the “attack on the civilian population” and the “armed conflict” must be separate notions. . . .’”

(3) the “attack” may be, but need not be, part of the “armed conflict”

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 86: “[T]he attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 543 (same); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 131 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 623 (similar).

Tadić, (Appeals Chamber), July 15, 1999, para. 251: “[U]nder Article 5 of the Statute the attack on ‘any civilian population’ may be part of an ‘armed conflict.’” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182 (same); *Galic*, (Trial Chamber),

December 5, 2003, para. 141 (same); *Vasiljesic*, (Trial Chamber), November 29, 2002, para. 30 (same).

Galic, (Trial Chamber), December 5, 2003, para. 141: “In accordance with customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it.” See also *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 39 (similar); *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 233 (similar).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 39: “The attack need not be part of the armed conflict because (i) the concept of ‘attack’ is not limited to the use of armed force, but has been held to encompass any mistreatment of the civilian population, and (ii) it is conceivable that where the existence of an armed conflict satisfies the jurisdictional requirement, an attack unconnected to the armed conflict, but nonetheless directed against a civilian population, could satisfy the customary international law requirements for a crime against humanity.”

(4) “attack” not limited to use of armed force

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 86: “[T]he attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 543 (same as *Limaj*); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 131 (same as *Limaj*); *Stakic*, (Trial Chamber), July 31, 2003, para. 623 (same as *Kunarac*); *Vasiljesic*, (Trial Chamber), November 29, 2002, para. 29 (same as *Limaj*).

Limaj et al., (Trial Chamber), November 30, 2005, para. 194: “[T]o amount to an ‘attack’ the relevant conduct need not amount to a military assault or forceful takeover, the evidence need only demonstrate a ‘course of conduct’ directed against the civilian population that indicates a widespread or systematic reach.”

Galic, (Trial Chamber), December 5, 2003, para. 141: “In the context of a crime against humanity, ‘attack’ is not limited to armed combat. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as of a person in detention.”

For discussion of the widespread or systematic requirement, see “the attack must be ‘widespread or systematic’ (element 4),” Section (IV)(b)(v), ICTY Digest.

(5) when establishing the attack, generally irrelevant that the other side committed atrocities or attack

Kumarac, Kovac, and Vukovic, (Appeals Chamber) June 12, 2002, paras. 97, 87-88: The Trial Chamber “correctly stated that the existence of an attack upon one side’s civilian population would not disprove or cancel out that side’s attack upon the other’s civilian population.”

“[W]hen establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent’s civilian population. The existence of an attack from one side against the other side’s civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side’s forces were in fact targeting a civilian population as such. Each attack against the other’s civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.”

“Evidence of an attack by the other party on the accused’s civilian population may not be introduced unless it tends ‘to prove or disprove any of the allegations made in the indictment,’ notably to refute the Prosecutor’s contention that there was a widespread or systematic attack against a civilian population. A submission that the other side is responsible for starting the hostilities would not, for instance, disprove that there was an attack against a particular civilian population.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 131: “To establish whether there was an attack, it is not relevant that the other side also committed atrocities against its opponent’s civilian population. Each attack against the other side’s civilian population would be equally illegitimate and crimes committed as part of such attack could, all other conditions being met, amount to crimes against humanity.”

Galic, (Trial Chamber), December 5, 2003, para. 145: “Evidence of attack by opposing forces on the civilian population to which the accused belongs may not be introduced unless it tends to prove or disprove an allegation made in an indictment, such as the Prosecution’s contention that there was a widespread or systematic attack against a civilian population. A submission that the opposing side is responsible for starting the hostilities is not relevant to disproving the allegation that there was an attack on the civilian population in question.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 40: “Once an ‘attack’ is established in the context of an armed conflict, it is irrelevant whether another side to the armed conflict is also involved in an attack upon a civilian population. Such other attacks would not amount to justification for the attack in question, and any crimes

committed in the course of such an attack by another side to the armed conflict would themselves be subject to prosecution as crimes against humanity.”

(6) application—there was an attack

For findings that there was an attack in the territory of Kosovo, see *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 195-204.

iii) the acts of the accused must form part of the attack (element 2)

(1) nexus

Prosecutor v. Deronjic, Case No. IT-02-61-A (Appeals Chamber), July 20, 2005, para. 109: “The acts of the accused need only be a part of the attack”

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 99: “The acts of the accused must constitute part of the attack. In effect, as properly identified by the Trial Chamber, the required nexus between the acts of the accused and the attack consists of two elements:

- the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
- knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.”

See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 188 (quoting same); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 547 (quoting same); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 41 (similar first sentence).

Tadic, (Appeals Chamber), July 15, 1999, para. 251: “A nexus with the accused’s acts is required . . . only for the attack on ‘any civilian population.’”

Limaj et al., (Trial Chamber), November 30, 2005, para. 180: “[T]he only nexus required is that between the acts of an accused and the attack on the civilian population” See also *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 33 (similar).

For discussion of the requirement that the accused have knowledge that there is an attack on a civilian population and that his or her acts are part thereof, see *mens rea*, (IV)(b)(vi)(2)(a), ICTY Digest.

(2) crimes must be related to/part of the attack not isolated acts of the accused

Tadić, (Appeals Chamber), July 15, 1999, para. 271: “[I]o convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict). . . .” (emphasis in original) *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 189 (same test).

Limaj et al., (Trial Chamber), November 30, 2005, para. 189: “[I]t must be established that the acts of the accused are not isolated, but rather, by their nature and consequence, are objectively part of the attack.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 194: “It has been emphasised, repeatedly, that the contextual element required for the application of Article 5 serves to exclude single, random or limited acts from the domain of crimes against humanity.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 547: “The act or acts must not be isolated or random; they may not be so far removed from the attack that, having considered the context and circumstances in which it occurred, the act or acts cannot reasonably be said to have been part of the attack.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 132: “The acts of the accused need to objectively ‘form part’ of the attack by their nature or consequences, as distinct from being committed in isolation” *See also Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 41 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 234 (similar).

See also Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 41: “‘Isolated acts’ are defined as those acts ‘so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.’ The acts of the accused are less likely to be considered random or isolated where they amount to a course of conduct against a civilian population.”

(3) the acts need not be committed in the midst of, or at the height of, the attack

Limaj et al., (Trial Chamber), November 30, 2005, para. 189: “The acts [of the accused] need not be committed in the midst of that attack provided that they are sufficiently connected to that attack.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 132: “The acts of the accused . . . do not need to be committed in the midst of the attack. For instance, the *Kunarac* Trial Chamber found that a crime committed several months after, or several kilometres away from the main attack could still, if sufficiently connected otherwise, be part of that attack.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 41: “The acts of the accused need not be committed in the midst, or at the height of the attack . . .”

**iv) the attack must be “directed against any civilian population”
(element 3)**

Blaskić, (Appeals Chamber), July 29, 2004, para. 98: “It is well established in the jurisprudence of the International Tribunal that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 185: “The attack must be directed against a civilian population.” *See also Galić*, (Trial Chamber), December 5, 2003, para. 143 (same).

Kunarac, Kovac, and Vuković, (Trial Chamber), February 22, 2001, para. 410: To show crimes against humanity, one element is there must be an attack “directed against any civilian population.”

For discussion that “the attack must be ‘widespread or systematic’ (element 4),” see Section (IV)(b)(v), ICTY Digest.

(1) “directed against”

**(a) an attack is “directed against” a civilian population if the
civilian population is the primary object of the attack**

Blaskić, (Appeals Chamber), July 29, 2004, para. 106: “The Appeals Chamber in *Kunarac* . . . stated:

... the expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack’ . . .”

See also Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 96 (quoting same); *Kunarac, Kovac, and Vuković*, (Appeals Chamber), June 12, 2002, para. 91 (same as *Blaskić*); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 185 (quoting same); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 134 (similar); *Galić*, (Trial Chamber),

December 5, 2003, para. 142 (quoting same); *Stakić*, (Trial Chamber), July 31, 2003, para. 624 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 235 (similar).

**(b) not entire population, but a sufficient number must be
subject to the attack, rather than a limited and randomly
selected number of individuals**

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 95: “In *Kunarac et al.*, the Appeals Chamber discussed the requirement that an attack is directed against a civilian population, stating that:

the use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population,’ rather than against a limited and randomly selected number of individuals.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 105 (same language as quoted); *Kunarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 90 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 187 (same language as quoted); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 134 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 143 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 42 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 624 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 235 (same).

**(c) factors for assessing whether the attack was directed
against the civilian population**

Blaskić, (Appeals Chamber), July 29, 2004, para. 106: “The Appeals Chamber in *Kunarac* . . . stated:

. . . In order to determine whether the attack may be said to have been so directed [against the civilian population], the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war . . .”

See also Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 96 (quoting same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 185 (quoting same); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 134 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 142 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October

17, 2003, para. 42 (similar); *Kunarac, Kovac, and Vokotic*, (Appeals Chamber), June 12, 2002, para. 90 (source of quoted language).

(d) attack directed against a civilian population will most often occur at the behest of a state

Limaj et al., (Trial Chamber), November 30, 2005, para. 191: “Due to structural factors and organisational and military capabilities, an ‘attack directed against a civilian population’ will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a ‘widespread’ scale, or upon a ‘systematic’ basis. In contrast, the factual situation before the Chamber involves the allegation of an attack against a civilian population perpetrated by a non-state actor with extremely limited resources, personnel and organisation.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 194: “[T]he existence of an attack is most clearly evident when a course of conduct is launched on the basis of massive state action. This can be seen from a number of examples. In *Prosecutor v. Nikolic* the Trial Chamber looked to the existence of discriminatory measures and an ‘authoritarian take-over’ that installed a new ‘authoritarian power structure’ as evidence of an attack in the relevant geographical region. In *Prosecutor v. Mrksic et al.*, the Trial Chamber looked to, as relevant factors in discerning the existence of an attack, a number of factors that included: the ‘massive land, naval and air offensive by the forces of the JNA [Army of the Socialist Federal Republic of Yugoslavia]; intensive shelling of the city of Vukovar for a period of three months; and the deportation of women and children *en masse*.”

For discussion that “the attack must be ‘widespread or systematic’ (element 4),” see Section (IV)(b)(v), ICTY Digest.

(e) targeting a number of political opponents insufficient

Limaj et al., (Trial Chamber), November 30, 2005, para. 187: “It is established that the targeting of a select group of civilians—for example, the targeted killing of a number of political opponents—cannot satisfy the requirements of Article 5.”

(f) the laws of war provide a benchmark to assess the nature of the attack and legality of acts committed

Blaskić, (Appeals Chamber), July 29, 2004, para. 106: “The Appeals Chamber in *Kunarac* . . . stated:

. . . To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.”

See also Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 96 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 185 (same).

Galić, (Trial Chamber), December 5, 2003, para. 144: “The Trial Chamber accepts that when considering the general requirements of Article 5, the body of [the] laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been targeted as such.”

(2) civilian population

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 97: “In determining the scope of the term ‘civilian population,’ the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. The Appeals Chamber considers that Article 50 of Additional Protocol I [to the Geneva Conventions] contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 110 (similar).

See also Limaj et al., (Trial Chamber), November 30, 2005, para. 223: “The provisions of Article 50 [of Additional Protocol I to the Geneva Conventions] have been considered by the Appeals Chamber to reflect customary international law. The Chamber acknowledges, however, that the definition of ‘civilian’ employed in the laws of war cannot be imported wholesale into discussion of crimes against humanity. In this regard the Chamber notes that the Trial Chamber in *Prosecutor v Tadić* determined that:

[The] definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs or war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term ‘civilian.’”

(a) defined

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 544: “The term ‘civilian’ refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention or any other cause. It is a principle of customary international law that these persons are protected in armed conflicts.”

(b) population must be “predominantly” civilian

Limaj et al., (Trial Chamber), November 30, 2005, para. 186: “The Chamber recalls that there is an absolute prohibition against targeting civilians in customary international law. The terms ‘civilian population’ must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as ‘civilian’ even if non-civilians are among it, as long as it is predominantly civilian.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 134: “It is not required that every single member of that population be a civilian – it is enough if it is predominantly civilian in nature, and may include, *e.g.*, individuals *hors de combat*.”

Galic, (Trial Chamber), December 5, 2003, para. 143: “A population may qualify as ‘civilian’ even if non-civilians are among it, as long as the population is predominantly civilian.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 544 (similar); *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 235 (similar); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 180 (similar).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 42: “Both the primary object of the attack and its victims must be ‘any civilian population,’ a phrase that pertains to any predominantly civilian population, notwithstanding the presence of non-civilians.”

(c) construe civilian population liberally/ cases of doubt

Blaskic, (Appeals Chamber), July 29, 2004, para. 111: “Article 50, paragraph 1, of Additional Protocol I states . . . ‘In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.’ The Appeals Chamber notes that the imperative ‘in case of doubt’ is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 186: “The terms ‘civilian population’ must be interpreted broadly”

Limaj et al., (Trial Chamber), November 30, 2005, para. 223: “The Chamber recalls that Article 50, paragraph 1 of Additional Protocol I to the Geneva Conventions (which the Defence invite the Chamber to apply in the present situation) states that “[i]n case of doubt whether a person is a civilian, that person shall be considered a civilian.””

Prosecutor v. Kupreskic et al., Case No. IT-95-16 (Trial Chamber), January 14, 2000, para. 547: “It would seem that a wide definition of ‘civilian’ and ‘population’ is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. [A] broad interpretation should . . . be placed on the word ‘civilians,’ the more so because the limitation [safeguarding civilians and not combatants] in Article 5 constitutes a departure from customary international law.”

Jelavic, (Trial Chamber), December 14, 1999, para. 54: “It follows from the letter and the spirit of Article 5 that the term ‘civilian population’ must be interpreted broadly.”

See also “cases of doubt” as to whether someone is a civilian, under Article 3, Section (II)(d)(xi)(5)(d), ICTY Digest.

(d) those excluded from civilian status

Blaskic, (Appeals Chamber), July 29, 2004, para. 111: “Article 50, paragraph 1, of Additional Protocol I states that a civilian is ‘any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. . . .’”

Blaskic, (Appeals Chamber), July 29, 2004, para. 112: “As the ICRC [International Committee of the Red Cross] Commentary to the Additional Protocol explains, the following categories of persons, derived from Article 4A of the Third Geneva Convention, are excluded from civilian status:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.

- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. [...]]
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 113: “Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war.”

(i) member of armed group, even if not armed or in combat, not a civilian

Blaskic, (Appeals Chamber), July 29, 2004, para. 114: “[T]he Trial Chamber’s view [in *Blaskic*] that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC [International Committee of the Red Cross] Commentary is instructive on this point and states:

All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).

As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.”

(e) civilian includes those who were members of a resistance movement, former combatants, and others *hors de combat*

Limaj et al., (Trial Chamber), November 30, 2005, para. 186: “[T]he definition of a ‘civilian’ is expansive and includes individuals who at one time performed acts of resistance, as well as persons who were *hors de combat* when the crime was committed.” See also *Galic*, (Trial Chamber), December 5, 2003, para. 143 (similar).

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 235: “[T]he definition of civilian population includes individuals who may at one time have performed acts of resistance and persons *hors de combat* . . .”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 180: “[I]ndividuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity.”

Blaskic, (Trial Chamber), March 3, 2000, para. 214: “Crimes against humanity . . . do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore uniform or not - but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained.”

Jelavic, (Trial Chamber), December 14, 1999, para. 54: “[T]he notion of civilian population as used in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed *hors de combat* when the crime is perpetrated.”

See also *Blaskic*, (Appeals Chamber), July 29, 2004, para. 113: “[T]he Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 186 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 544 (similar).

(f) to determine whether presence of soldiers deprives population of its civilian nature, examine number of soldiers and whether they are on leave

Blaskic, (Appeals Chamber), July 29, 2004, para. 115: “The Trial Chamber . . . stated that the ‘presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.’ The ICRC [International Committee of the Red Cross] Commentary on this point states:

... in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.

Thus, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 186: “Relevant to the determination whether the presence of soldiers within a civilian population deprives the population of its civilian character are the number of soldiers as well as whether they are on leave.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 134: “[T]he presence of soldiers, provided that they are on leave and do not amount to ‘fairly large numbers,’ within an intentionally targeted civilian population does not alter the civilian nature of that population.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 235: “[T]he presence of a number of non-civilians cannot refute the predominantly civilian character of a population.” See also *Blaskic*, (Trial Chamber), March 3, 2000, para. 214 (similar); *Jelusic*, (Trial Chamber), December 14, 1999, para. 54 (similar).

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 549: “[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”

(g) protects “any” civilian population

Limaj et al., (Trial Chamber), November 30, 2005, para. 186: “There is no requirement that the victims are linked to any particular side of the conflict.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 544: “It is not necessary to demonstrate that the victims are linked to any particular side of the armed conflict. The Appeals Chamber has recently emphasised that ‘there is an absolute prohibition on the targeting of civilians in customary international law.’”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 33: “The protection of Article 5 extends to ‘any’ civilian population including, if a state takes part in the attack, that state’s own population. It is therefore unnecessary to demonstrate that the victims were linked to any particular side of the conflict.”

(3) application—attack directed against a civilian population

**(a) abduction, detention or mistreatment of Serbian civilians
by the Kosovo Liberation Army**

**(i) perceived collaborators generally entitled to civilian
status**

Limaj et al., (Trial Chamber), November 30, 2005, paras. 223, 224: “The Chamber is satisfied that the KLA [Kosovo Liberation Army] definition of ‘collaborators’ encompassed civilians as well as perceived combatants.” “Taking account of [*inter alia*, the provisions of Article 50 of Additional Protocol I to the Geneva Conventions], and in light of the evidence before the Chamber concerning those apprehended and detained because of their alleged or suspected acts of collaboration, the Chamber concludes that, at least as a general rule, perceived collaborators abducted by the KLA were entitled to civilian status.”

**(ii) abductions, detentions or mistreatment not on a scale
or frequency to be considered an attack directed
against a civilian population**

Limaj et al., (Trial Chamber), November 30, 2005, paras. 225, 228: “To acknowledge the abduction of specific civilians, whether Serbian or Kosovo Albanian, . . . does not demonstrate, however, at least in the established circumstances of this case, that the KLA [Kosovo Liberation Army] had a policy[¹⁶] to target a ‘civilian population.’ The evidence does indicate that some abducted Serbs suspected of being military or police were subjected to considerable violence and otherwise mistreated as an interrogation technique as the KLA sought to verify suspicions. A number of abducted Serbs, apparently civilian, were later murdered by the KLA. Others have not been heard from since their abduction or since they were seen in KLA custody. However, some were released. The evidence does not allow a determination in most cases as to why some were released, but others not. Clearly, in many cases there was a process of decision by the KLA. On what basis that process of decision turned is not, however, established by

¹⁶ The *Limaj* Trial Chamber is looking at the existence of a “policy” as an indicia of a systematic attack against a civilian population, not as a legal element for crimes against humanity. See *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 212, 184 (“The existence of a plan or policy can be indicative of the systematic character of offences charged as crimes against humanity.” However, “[t]he existence of a policy or plan . . . is not a legal requirement, to establish the widespread or systematic nature of the attack and that it was directed against a civilian population.”).

the evidence. In many, but not all, cases, connection with the Serbian police or military or involvement in armed civilian or paramilitary forces engaged against the KLA may be a, or the, determinative factor. Whatever was the basis, the existence of a process of decision which affected the consequences of KLA abduction tells with some force against the existence and perpetration of a general KLA strategy of abduction of the Serbian civilian population of Kosovo. The evidence does not establish that the abduction, detention or mistreatment of Serbian civilians was on a scale or frequency such that the attack could be considered to have been directed against a civilian population.”

“Upon consideration of the evidence before it, the Chamber finds that at the time relevant to the Indictment there was no attack by the KLA directed against a ‘civilian population,’ whether Kosovo Albanian or Serbian in ethnicity, and no attack that could be said to indicate a ‘widespread’ scale; however, as indicated earlier there is evidence of a level of systematic or coordinated organisation to the abduction and detention of certain individuals. While the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, the Chamber finds that there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity It has not been established that Article 5 applies in the present case.”

For discussion that “the attack must be ‘widespread or systematic’ (element 4),” see Section (IV)(b)(v), ICTY Digest.

(b) events in Prijedor constituted an attack directed against a civilian population

Stakić, (Trial Chamber), July 31, 2003, para. 627: “The Trial Chamber is satisfied that the events which took place in [the] Prijedor municipality between 30 April and 30 September 1992 constitute an attack directed against a civilian population. The scale of the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals. Rather, most of the non-Serb population in the Municipality of Prijedor was directly affected. Moreover, it is clear from the combat reports that the Serb military forces had the overwhelming power as compared to the modest resistance forces of the non-Serbs. General Wilmot, who testified as the military expert in the Defence case, acknowledged that the scale of the attack on Hambanine was disproportionate to the threat posed by the resistance forces active in those areas. Those attacks, and the ones that followed in the broader Brdo region, coupled with the arrests, detention and deportation of citizens that came next, were primarily directed against the non-Serb civilian population in the Municipality of Prijedor.”

v) the attack must be “widespread or systematic” (element 4)

(1) widespread or systematic

Deronjić, (Appeals Chamber), July 20, 2005, para. 109: “[I]n order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population” *See also Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 93 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 102: “[T]he Appeals Chamber concludes that the Trial Chamber [in *Blaskić*] was correct in stating that acts constituting crimes against humanity must be part of a widespread or systematic attack against civilians.”

Kunarac, Kovac, and Vuković, (Appeals Chamber) June 12, 2002, para. 97: “The Trial Chamber thus correctly found that the attack must be either ‘widespread’ or ‘systematic’, that is, that the requirement is disjunctive rather than cumulative.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 183 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 135 (same as *Limaj*).

Galic, (Trial Chamber), December 5, 2003, para. 146: “The attack must be widespread or systematic.” *See also Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 43 (similar); *Nalečić and Martinović*, (Trial Chamber), March 31, 2003, para. 236 (similar).

(2) only the attack, not the accused’s acts, must be widespread or systematic

Deronjić, (Appeals Chamber), July 20, 2005, para. 109: “[T]his requirement [of a widespread or systematic attack] only applies to the attack and not to the individual acts of the accused.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 94: “Only the attack, not the individual acts of the accused, must be widespread or systematic.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 101 (same); *Kunarac, Kovac, and Vuković*, (Appeals Chamber) June 12, 2002, para. 96 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 189 (same); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 135 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 43; *Kunarac, Kovac and Vuković*, (Trial Chamber), February 22, 2001, para. 431 (same).

(3) widespread

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 94: “In relation to the widespread or systematic nature of the attack, the Appeals Chamber notes the jurisprudence of the International Tribunal according to which the phrase ‘widespread’ refers to the large-scale nature of the attack and the number of targeted persons” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 101 (same).

Limaj et al., (Trial Chamber), November 30, 2005, para. 183: “The term ‘widespread’ refers to the large scale nature of the attack and the number of victims” *See also Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 545 (same); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 135 (similar); *Galić*, (Trial Chamber), December 5, 2003, para. 146 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 43 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 625 (same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 545: A crime may be widespread by the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’” *See also Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 236 (same as *Kordić*); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 179 (similar).

(4) systematic

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 94: “[T]he phrase ‘systematic’ refers to the organised nature of the acts of violence and the improbability of their random occurrence.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 101 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 183 (same); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 43 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 625 (same); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 236 (similar).

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 94: “Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 101 (same); *Kumarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002 (similar); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 183 (same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 545: “The term ‘systematic’ refers to an ‘organised nature of the acts of violence and the improbability of their random occurrence,’ and is often expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 135: “[T]he term ‘systematic’ refers to the organised nature of the acts of violence and the non-accidental recurrence of similar criminal conduct on a regular basis.”

Galic, (Trial Chamber), December 5, 2003, para. 146: “[S]ystematic’ refers to the organized nature of the attack.”

Blaskic, (Trial Chamber), March 3, 2000, para. 203: “The systematic character refers to four elements which . . . may be expressed as follows: [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; [3] the preparation and use of significant public or private resources, whether military or other; [4] the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.”¹⁶

(5) assessing widespread or systematic

Kunarac, Kovac, and Vukovic, (Appeals Chamber) June 12, 2002, para. 95: “A Trial Chamber must . . . ‘first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic.’” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 183 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 146 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 43 (similar).

(a) factors to consider

Kunarac, Kovac, and Vukovic, (Appeals Chamber) June 12, 2002, para. 95: “The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack vis-à-vis this civilian population.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 183 (same);

¹⁶ This formulation is criticized on appeal. See *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 99-100, 117-120.

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 43 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 625 (similar).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 546: “The Appeals Chamber . . . provided a non-exhaustive list of factors that could be taken into account in determining whether an attack meets the requirements of ‘widespread’ or ‘systematic.’ These factors are: the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 136 (similar).

Jelić, (Trial Chamber), December 14, 1999, para. 53: “The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.”¹⁷

(6) single act, if linked to a widespread or systematic attack, may qualify as a crime against humanity

Đeronjić, (Appeals Chamber), July 20, 2005, para. 109: “[A]ll other conditions being met, a single or limited number of acts on [the accused’s] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.” See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 94 (similar); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 101 (same as *Kordić*); *Kunarac, Kovac, and Vuković*, (Appeals Chamber) June 12, 2002, para. 96 (same as *Kordić*); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 135 (similar).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 43: “Provided that the acts of the individual are sufficiently linked to the widespread or systematic attack, and are not found to be random or isolated, it is possible that a single act could be found to be a crime against humanity.”

¹⁷ As to whether there is any requirement of a plan or policy, see discussion, Section (IV)(b)(v)(7), ICTY Digest.

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 178: “[A] single isolated act by a perpetrator, if linked to a widespread or systematic attack, could constitute a crime against humanity.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 550: “[I]n certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context. An *isolated* act, however – i.e. an atrocity which did not occur within such a context – cannot.”

(7) no plan or policy required, although may be useful to show the attack was widespread or systematic

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 98: “The Appeals Chamber notes that the Prosecution has withdrawn its first ground of appeal [regarding whether the acts of the accused and the attack must have been committed in pursuance to a pre-existing criminal policy or plan]. [S]ince the *Kunarac et al.* Appeal Judgement, the jurisprudence on this point is settled.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 120: “In relation to this issue [whether the existence of a plan is a legal element of a crime against humanity], the Appeals Chamber has stated, on a previous occasion:

... neither the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan.’ There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.

The Appeals Chamber agrees that a plan or policy is not a legal element of a crime against humanity, though it may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 184 (similar to last sentence).

Blaskić, (Appeals Chamber), July 29, 2004, paras. 100, 126: “In the view of the Appeals Chamber, the existence of a plan or policy may be evidentially relevant, but is not a legal

element of the crime.” “There is no legal requirement of a plan or policy, and the Trial Chamber’s statement is misleading in this regard” *Reversing on this point Blaskić*, (Trial Chamber), March 3, 2000, para. 204. *See also Krstić*, (Appeals Chamber), April 19, 2004, para. 225 (similar to *Blaskić*); *Kunarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 98 (similar to *Blaskić*).

Limaj et al., (Trial Chamber), November 30, 2005, para. 212: “The existence of a plan or policy can be indicative of the systematic character of offences charged as crimes against humanity. The existence of a ‘policy’ to conduct an attack against a civilian population is most easily determined or inferred when a State’s conduct is in question; but absence of a policy does not mean that a widespread or systematic attack against a civilian population has not occurred. Although not a legal element of Article 5, evidence of a policy or plan is an important indication that the acts in question are not merely the workings of individuals acting pursuant to haphazard or individual design, but instead have a level of organisational coherence and support of a magnitude sufficient to elevate them into the realm of crimes against humanity. It stands to reason that an attack against a civilian population will most often evince the presence of policy when the acts in question are performed against the backdrop of significant State action and where formal channels of command can be discerned.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 546: “Neither the attack nor the acts of the accused need to be supported by a ‘policy’ or ‘plan.’”

Brđjanin, (Trial Chamber), September 1, 2004, para. 137: “There is no requirement under customary international law that the acts of the accused need to be supported by any form of policy or plan. The existence of a policy or plan may evidentially be relevant to the requirements of a widespread or systematic attack and the accused’s participation in the attack, but it is not a legal element of the crime.” *See also Galić*, (Trial Chamber), December 5, 2003, para. 147 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 44 (similar).

(a) a level of *de facto* control over territory necessary to demonstrate that a sub-state unit or armed opposition group has a policy to direct an attack

Limaj et al., (Trial Chamber), November 30, 2005, para. 213: “Special issues arise . . . in considering whether a sub-state unit or armed opposition group, whether insurrectionist or trans-boundary in nature, evinces a policy to direct an attack. One requirement such an organisational unit must demonstrate in order to have sufficient competence to formulate a policy is a level of *de facto* control over territory. As was said by the Trial Chamber in *Prosecutor v Tadić*:

‘the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory.’”¹⁸

(8) both civilian status of the victims and scale or level of organization characterize a crime against humanity

Blaskic, (Appeals Chamber), July 29, 2004, para. 107: “In this case, the Trial Chamber correctly recognized that a crime against humanity applies to acts directed against any civilian population. However, it stated that ‘the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed.’ The Appeals Chamber considers that *both* the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity.” (emphasis added)

(9) application—widespread or systematic attack

(a) attacks carried out by Croats against the Bosnian Muslim civilian population in Central Bosnia widespread, systematic and directed against a civilian population

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 666-669: “[F]or determining when the common elements of crimes against humanity have been established,” [t]he first issue is whether a reasonable trier of fact could have concluded beyond reasonable doubt that there was a widespread or systematic attack directed against any civilian population”

“In January 1993 in the town of Busovaca, numerous civilians were targeted and killed, and the following crimes were committed:

- murder, a crime against humanity;
- unlawful attacks on civilians and civilian objects;
- wanton destruction not justified by military necessity;
- and plunder of public or private property.”

“The following crimes were committed in Central Bosnia, in April and/or June 1993, *inter alia*, in:

- Ahmici: the massacre, which was directed against the civilian population;

¹⁸ The *Limaj* Trial Chamber is looking at the existence of a “policy” as an indicia of a systematic attack, not as a legal element for crimes against humanity. See *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 212, 184.

- Santici: unlawful attack on civilians and civilian objects; murder, a crime against humanity; and wanton destruction not justified by military necessity;
- Nadioci, Pirici: unlawful attack on civilians; murder, a crime against humanity;
- Gacice: wanton destruction not justified by military necessity;
- Veceriska/Donja Veceriska: unlawful attack on civilian objects and wanton destruction not justified by military necessity;
- Ocehnici: wanton destruction not justified by military necessity;
- Kiseljak municipality: unlawful attack on civilians, murder, a crime against humanity, inhumane acts, a crime against humanity, and plunder of public or private property in Rotilj in April 1993; wanton destruction not justified by military necessity in Svinjarevo, Gomionica, Visnjica, Polje Visnjica, Behrici, and Gromiljak in April 1993; plunder of public or private property in Gomionica; murder and inhumane acts, crimes against humanity, and plunder of public or private property in Tulica in June 1993; and murder, a crime against humanity, and destruction or wilful damage to institutions dedicated to religion or education in Han-Ploca in June 1993; and wanton destruction not justified by military necessity and plunder of public or private property in Han-Ploca-Grahovci in June 1993;
- Kaonik, the Dubravica Elementary School, the SDK building, the Vitez Cinema, the village of Rotilj, the Kiseljak barracks; and the Kiseljak municipal building: unlawful confinement of civilians.”

“These findings, upheld above by the Appeals Chamber and underpinned by evidence discussed at length in this Judgement, demonstrate that there were attacks carried out by Croats against the Bosnian Muslim civilian population in Central Bosnia from January to June 1993. They have to be characterised as widespread, systematic and directed against a civilian population.”

**(b) there was a widespread or systematic attack against the
Bosnian Muslim and Bosnian Croat civilian population in
the Bosnian Krajina**

Brđanin, (Trial Chamber), September 1, 2004, paras. 157-158: “The Trial Chamber is satisfied beyond reasonable doubt that there was a widespread or systematic attack against the Bosnian Muslim and Bosnian Croat civilian population in the Bosnian Krajina during the period relevant to the Indictment [April 1, 1992 through December 31, 1992]. The attack took many forms. By the end of 1992, nearly all Bosnian Muslims and Bosnian Croats had been dismissed from their jobs in, amongst others, the media, the army, the police, the judiciary and public companies. Numerous crimes were committed against Bosnian Muslims and Bosnian Croats, including murder, torture, beatings, rape, plunder and the destruction of property. Villages were shelled, houses were torched and looted. In the spring of 1992, a number of detention camps where Bosnian Muslim and Bosnian Croat civilians were arrested and detained *en masse* were

established throughout the [Autonomous Region of Krajina (“ARK”)]. In several instances, mass killings of civilians took place. Moreover, a policy of ‘ethnically cleansing’ the ARK of its non-Serb population was systematically implemented by the Bosnian Serbs. Indeed, tens of thousands of Bosnian Muslims and Bosnian Croats were forcibly expelled from the ARK by the Bosnian Serbs and taken in convoys of buses and trains to Bosnian Muslim held territory in [Bosnia-Herzegovina] or to Croatia. On the basis of the pattern of conduct by which these crimes were committed throughout the Bosnian Krajina, the Trial Chamber is satisfied that they were mostly perpetrated with a view to implement the Strategic Plan.” See *Brđanin*, (Trial Chamber), September 1, 2004, para. 65 (the “Strategic Plan” consisted of “the Bosnian Serb leadership, including the members of the Main Board of the [Serbian Democratic Party] and other members of the [Serbian Democratic Party], as well as Bosnian Serb representatives of the armed forces, form[ing] a plan to link Serb-populated areas in [Bosnia and Herzegovina] together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed . . .”).

**(c) plan to rid Prijedor municipality of non-Serbs was a
widespread and systematic attack against the civilian
population**

Stakić, (Trial Chamber), July 31, 2003, paras. 629-630: The Trial Chamber stated as to the “systematic” nature of the attack: “The Chamber is satisfied that the attack directed against the civilian population was prepared as of 7 January 1992 when the Assembly of the Serbian People in Prijedor was first established. The plan to rid the Prijedor municipality of non-Serbs and others not loyal to the Serb authorities was activated through the takeover of power by Serbs on 30 April 1992. Thereafter the attack directed against the civilian population intensified, according to the plan, culminating with the attacks on Hambarine and Kozarac in late May 1992. Attacks on predominantly non-Serb areas including the Brdo region ensued, with hundreds of non-Serbs killed and many more arrested and detained by the Serb authorities, *inter alia* in detention facilities.”

“Having established that the attack was systematic, it is not strictly necessary to consider the requirement that the attack be widespread. Nonetheless, the Chamber finds that the attack on the non-Serb population of Prijedor was also widespread. The attacks, as such, occurred throughout the municipality of Prijedor, initially in Hambarine and Kozarac, and then spreading to the whole of the Brdo region. Moreover, thousands of citizens of Prijedor municipality passed through one or more of the three main detention camps, Omarska, Keraterm and Trnopolje, established in the towns of Omarska, Prijedor and Trnopolje respectively.”

vi) *mens rea* (element 5)

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 99: “The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 124 (same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 548: “The accused must possess the necessary *mens rea*, which includes:

- (i) the intent to commit the underlying offence or offences with which he is charged;
- (ii) the knowledge that there is an attack against the civilian population; and
- (iii) the knowledge that his acts comprise part of that attack.”

See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 138 (similar); *Galić*, (Trial Chamber), December 5, 2003, para. 148 (similar).

Kupreskić et al., (Trial Chamber), January 14, 2000, para. 556: “[T]he requisite *mens rea* for crimes against humanity appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) *knowledge* of the broader context in which that offence occurs.”

For discussion of “it does not suffice that the perpetrator knew of the attack and took the risk his acts were part of it,” see Section (IV)(b)(vi)(2)(b), ICTY Digest.

(1) intent

(a) the perpetrator must have intent to commit the underlying offense(s)

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 99: “[T]he accused [must have had] the requisite intent to commit the underlying offence(s) with which he is charged” *Blaskić*, (Appeals Chamber), July 29, 2004, para. 124 (same); *Vasiljević*, (Trial Chamber), November 29, 2002, para. 37 (similar).

See also discussion of mental state (*mens rea*) in underlying offenses, Section (IV)(d)(i)(5) (murder); (IV)(d)(ii)(4) (extermination); (IV)(d)(iii)(1) (enslavement); (IV)(d)(iv)(8) (deportation); (IV)(d)(v) (imprisonment); (IV)(d)(vi)(6) (torture); (IV)(d)(vii) (rape); (IV)(d)(viii)(4) (persecution); (IV)(d)(ix)(4)(c) (other inhumane acts), ICTY Digest.

(b) discriminatory intent only required for persecution

Tadić, (Appeals Chamber), July 15, 1999, paras. 283, 292, 305: “The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely ‘persecutions provided for in Article 5 (h).’” “[C]ustomary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.” “[T]he Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.”

Kordić and Čerkez, (Trial Chamber), February 26, 2001, para. 186: “The Appeals Chamber in *Tadić* clarified another issue in relation to the requisite *mens rea* for crimes against humanity. It rejected the view that to constitute a crime against humanity all relevant acts or omissions must be undertaken by the perpetrator on discriminatory grounds. [D]iscriminatory intent ‘is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution.’”

Blaskić, (Trial Chamber), March 3, 2000, paras. 244, 260: “[T]o be judged guilty of crimes against humanity, except in the case of persecution, [the perpetrator] [need] not have had the intent of targeting civilians because of their race or their religious or political beliefs.”

“[F]or a widespread or systematic attack and the resultant crimes – murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts with the exception of persecution – to be characterised as crimes against humanity they need not have been perpetrated with the deliberate intent to cause injury to a civilian population on the basis of specific characteristics. [T]o be found guilty of such an offence, those responsible for the attack need not necessarily have acted with a particular racial, national, religious or political intent in mind.”

Todorović, Case No. IT-95-9/1 (Trial Chamber), July 31, 2001, para. 113: The crime of persecution “is the only crime against humanity which requires that the perpetrator act with a discriminatory intent and, by its nature, it incorporates other crimes.”

(2) knowledge

(a) the perpetrator must knowingly participate in a widespread or systematic attack, i.e., have knowledge of the attack and that his act is part of the attack

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 100: “The Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required.” *See also Blaskic*, (Appeals Chamber), July 29, 2004, para. 126 (same).

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 99: There must be “knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 188 (same); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 547 (same).

Tadic, (Appeals Chamber), July 15, 1999, para. 271: “The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 190: “The second requirement to be established as part of the ‘nexus’ requirement is the knowledge of the accused that there is an attack on a civilian population and that his or her acts are part thereof.”

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 45: “To satisfy the subjective or *mens rea* element of the nexus between the acts of the accused and the attack, the perpetrator must know of the wider context in which his acts occur, and know that his acts are part of the attack.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 185: “[T]he perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. [. . .] Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context

of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.”¹⁹

Kunarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 410: In addition to the statutory requirement of an armed conflict, the following sub-elements are necessary: “. . . v) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.”

Blaskic, (Trial Chamber), March 3, 2000, para. 244: “The perpetrator must knowingly participate in a widespread or systematic attack against a civilian population.”

Blaskic, (Trial Chamber), March 3, 2000, para. 247: “The accused must first have knowledge of the general context in which his acts occur and then of the nexus between his action and that context.”

Jelavic, (Trial Chamber), December 14, 1999, para. 56: “The accused must . . . be aware that the underlying crime which he is committing forms part of the widespread and systematic attack.”

**(b) it does not suffice that the perpetrator knew of the attack
and took the risk his acts were part of it**

Blaskic, (Appeals Chamber), July 29, 2004, para. 126: “In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that it ‘suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan,’ did not correctly articulate the *mens rea* applicable to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber’s statement is misleading in this regard.”²⁰

See also Limaj et al., (Trial Chamber), November 30, 2005, para. 190: “It does not suffice that an accused knowingly took the risk of participating in the implementation of a policy.”

¹⁹ See Section (IV)(b)(v)(7), ICTY Digest, regarding plan or policy.

²⁰ See Section (IV)(b)(v)(7), ICTY Digest, regarding plan or policy.

But see Kunara, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 102: “[T]he accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known ‘that there is an attack on the civilian population and that his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack.’” See also *Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 46 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 626 (similar); *Vasiljević*, (Trial Chamber), November 29, 2002, para. 37 (the perpetrator “must know ‘that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack.’”); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 59 (similar to *Kunara*); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 59 (similar to *Vasiljević*).

(c) knowledge of the details of the attack not required

Kunara, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 102: “This requirement [that the accused have knowledge of the attack] does not entail knowledge of the details of the attack.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 548: “The *mens rea* requirement . . . does not entail knowledge of the details of the attack.” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 138 (similar); *Galić*, (Trial Chamber), December 5, 2003, para. 148 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 59 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 190: “[T]he accused need not know the details of the attack The accused merely needs to understand the overall context in which his or her acts took place.”

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, para. 45: “It is well established that the accused need not know the details of the attack, . . . :

It is the attack, not the acts of the accused, which must be directed against the target population, and the accused need only know that his acts are part thereof.”

(d) no requirement that the perpetrator approve of the context or share the purpose or goal behind the attack

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 99: “[T]he accused need not share the purpose or goal behind the attack.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 124 (same); *Kunara, Kovac, and Vokovic*, (Appeals Chamber), June 12, 2002, para. 103 (same); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 548 (same); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 138 (same); *Galić*, (Trial Chamber), December 5, 2003, para. 148 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 190: “[T]he accused need not . . . approve of the context in which his or her acts occur.” See also *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 185 (similar).

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 45: The accused need not “share the motive, intent, or purpose of those involved in the attack.”

(e) motive generally irrelevant

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 99: “[T]he Appeals Chamber considers that: “[f]or criminal liability pursuant to Article 5 of the Statute [to attach], ‘the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons. . . . At most, evidence that [the perpetrator] committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.’” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 124 (same language as quoted); *Kunarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 103 (quoting some of the same language).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 102: “The Appeals Chamber . . . recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out ‘the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.’ It is the Appeals Chamber’s belief that *this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.*” (emphasis added) See also *Jelisić*, (Appeals Chamber), July 5, 2001, para. 49 (same quoted language).

Tadić, (Appeals Chamber), July 15, 1999, paras. 270, 272: “[U]nder customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a ‘crime against humanity has been perpetrated.’ “[I]n the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal’s Statute.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 190: “The motives for the accused’s participation in the attack are irrelevant. . . .” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 138 (similar); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 187 (similar).

(f) it is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against the victim

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 99: “It is . . . irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 124 (same); *Kumarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 103 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 190 (similar).

(g) evidence of knowledge will vary from case to case

Blaskić, (Appeals Chamber), July 29, 2004, para. 126: “[T]he Appeals Chamber considers that evidence of knowledge on the part of the accused depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case. Therefore, the Appeals Chamber declines to set out a list of evidentiary elements which, if proved, would establish the requisite knowledge on the part of the accused.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 190: “Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case.”

(h) whether there are factors from which to infer knowledge of context

Blaskić, (Appeals Chamber), July 29, 2004, paras. 125, 127-128: “[The Trial Chamber stated:]

it must, for example, be proved that:

- the accused willingly agreed to carry out the functions he was performing;
- that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes;
- that he received orders relating to the ideology, policy or plan; and lastly
- that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.”

“The Appeals Chamber . . . observes that the Trial Chamber’s list of four points which may serve as proof of the *mens rea* suffers from a number of defects. The first point, that the accused ‘willingly agreed to carry out the functions he was performing,’ is vague and does not necessarily relate to the *mens rea* applicable to crimes against humanity. The second and third points, as well as the first part of the fourth point, may

be misleading because they could be interpreted as suggesting that an ideology, policy, or plan is required. Further, they too do not relate with sufficient precision to the requirement that the accused must know that his acts form part of the criminal attack. Finally, the second part of the fourth point seems to relate to command responsibility under Article 7(3), rather than Article 7(1) responsibility for crimes against humanity.”

“For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the *mens rea* applicable to crimes against humanity.”

Compare Blaskic, (Trial Chamber), March 3, 2000, paras. 258-259: “[K]nowledge of the political context in which the offence fits may be surmised from the concurrence of a number of concrete facts” and “these are: [a] the historical and political circumstances in which the acts of violence occurred; [b] the functions of the accused when the crimes were committed; [c] his responsibilities within the political or military hierarchy; [d] the direct and indirect relationship between the political and military hierarchy; [e] the scope and gravity of the acts perpetrated; [f] the nature of the crimes committed and the degree to which they are common knowledge.”

(i) application—*mens rea*: whether the acts of the accused formed part of a widespread and systematic attack and the accused knew of the attack

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 28, 30: “The Appellant argues that the Trial Chamber erroneously concluded that the acts of the Appellant formed part of a widespread and systematic attack and that he knew of the attack.” “It must be stressed that the Trial Chamber’s finding relevant to the present ground relates to the Appellant’s knowledge of on-going attacks against the Muslim civilian population in the region of Visegrad. The Appeals Chamber finds that . . . it is obvious from the various findings of the Trial Chamber . . . that the Appellant participated with Milan Lukic and others in the searching of the house of [a witness] father in Musici, and that he was present at the Vilina Vlas Hotel on 7 June 1992 when the seven Muslim men [who were later shot, five of whom died] arrived escorted by Milan Lukic and his men. Further, the Trial Chamber found that ‘in view of the sheer scale and systematic nature of the attack, the Accused must have noticed the consequences of this campaign upon the non-Serb civilian population of the Visegrad municipality.’ The Appeals Chamber is of the view that a reasonable Trial Chamber could conclude from the above that the Appellant knew about the on-going attack against the Muslim civilian population in Visegrad.”

c) Application—general elements for Article 5

i) Srebrenica

(1) armed conflict

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 549: “It has not been disputed that an armed conflict existed between the Republic of Bosnia and Herzegovina and its forces, and the Republika Srpska and its forces during the period relevant for the Indictment. Nor has it been disputed that this armed conflict existed in eastern Bosnia. Based on the evidence set out above in the Factual Background relevant to this case, the Trial Chamber finds that there is sufficient evidence to establish that there was an armed conflict in eastern Bosnia between 11 July and 1 November 1995.”

(2) widespread or systematic attack

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 551: “The Trial Chamber further finds that the attack was widespread or systematic. The attack, carried out by the [Army of the Republika Srpska] and [the Ministry of the Interior in Republika Srpska] was planned and defined in the ‘Krivaja 95’ order. The attack continued after the fall of Srebrenica and affected the approximately 40,000 people who lived within the Srebrenica enclave at the time of the attack.”

(3) directed against a civilian population

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 552: “The attack was clearly directed against the Bosnian Muslim civilian population in the Srebrenica enclave. The Trial Chamber has heard evidence that the 28th Division of the [Army of Bosnia-Herzegovina] was located in the Srebrenica enclave and that members of that division were among the men that formed the column. However, The Trial Chamber finds that the estimated number of members of the [Army of Bosnia-Herzegovina] present in the enclave and among the column, ranging from about 1,000 soldiers to 4,000 soldiers do not amount to such numbers that the civilian character of the population would be affected, as the vast majority of the people present in the enclave itself and in the column were civilians.”

(4) acts of the accused were part of the attack and the accused knew their acts were part of the attack

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 553-554: “Both Accused were high-ranking officers in brigades which took part in the attack on the Srebrenica

enclave and as such had knowledge of the wider context in which their own acts occurred. The Trial Chamber finds that it has been established beyond reasonable doubt that the acts of both Accused were part of the attack and that both Accused knew that their acts were part of the attack.” “Therefore, the Trial Chamber finds that the general requirements of Article . . . 5 have been met.”

ii) Sarajevo

Galic, (Trial Chamber), December 5, 2003, para. 598: “[T]he Trial Chamber finds that the required elements under Article 5 of the Statute that there must be an attack, that the attack must be directed against any civilian population, and that the attack be widespread or systematic have been satisfied. The Trial Chamber also finds that the crimes committed in Sarajevo during the Indictment Period [from around 10 September 1992 to 10 August 1994] formed part of an attack directed against the civilian population and this would have had been known to all who were positioned in and around Sarajevo at that time.” See also *Galic*, (Trial Chamber), December 5, 2003, para. 3 (discussing that there was 3 and ½ years of armed conflict in and around Sarajevo).

iii) Bosanski Samac and Odzak

(1) attack on the civilian population and existence of armed conflict

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 978: “The Trial Chamber finds that the events, which took place in Bosanski Samac and Odzak between 17 April 1992 and 31 December 1993, constituted an attack on the civilian population. This attack included the forcible takeover of power in Bosanski Samac, and the subsequent acts of persecution and deportation against non-Serb civilians. The Trial Chamber is satisfied that a state of armed conflict existed in the Republic of Bosnia and Herzegovina during the above mentioned period and that there was a nexus between the armed conflict and the acts of the Accused.”²¹

²¹ The *Simic* Trial Chamber appears to use the word “nexus” incorrectly. Under the case law, “[a] nexus between the accused’s acts and the armed conflict is not required” *Tadic*, (Appeals Chamber), July 15, 1999, para. 251 (emphasis in original). What is required is that the acts of the accused and the armed conflict be linked geographically as well as temporally. See *Kunarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 83; see also Section (IV)(b)(i)(2), ICTY Digest. The word “nexus” is, however, used to describe the relationship between the acts of the accused and the attack on the civilian population. See *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 33 (“the nexus which is required is between the accused’s acts and the attack on the civilian population.”); see also “the acts of the accused must form part of the attack”

(2) the attack was widespread and systematic

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 979-980: “While Article 5 of the Statute requires that the attack must be either widespread or systematic, the Trial Chamber finds that the attack against non-Serb civilians in the Bosanski Samac and Odzak Municipalities was both systematic and widespread. The attack was preceded by a series of acts, which indicate that it was planned and carried out in an organized fashion. These acts include military training of Serb men from Bosanski Samac at a camp near Ilok in mid March 1992, securing the presence of Serb paramilitary forces who arrived in Batkusa on 11 April 1992, and the establishment of the Crisis Staff on 15 April 1992. The forcible takeover on 17 April 1992 was followed by acts of systematic persecution against non-Serb civilians which included the arbitrary arrests of Bosnian Muslim and Bosnian Croat civilians and their unlawful detention in various facilities in Bosanski Samac, and in camps in Zasavica and Crkvina. Many were subjected to repeated beatings and other cruel and inhumane acts, in addition to deportation and forcible transfer.”

“The Trial Chamber finds that the attack in Bosanski Samac and Odzak was also widespread. It affected the vast majority of the residents of the Municipality. Approximately 250 non-Serb civilians were detained at the Territorial Defence Building in Bosanski Samac, the number of people detained at the secondary schools in Bosanski Samac was between 300 and 500. In May 1992 almost 1000 people were detained at the Omladinski Dom in Crkvina. A large number of them were subjected to torture or to cruel and inhumane treatment. Hundreds of non-Serbs were deported or forcibly transferred.”

(3) the accuseds’ knowledge of the attack and that their acts were part of the attack

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 981-982: “The Trial Chamber is satisfied that the three Accused knew of the attack against the non-Serb civilians in Bosanski Samac and that their acts were part of this attack. Blagoje Simic telephoned Lt. Col. Stevan Nikolic on 17 April 1992 to inform him that the Crisis Staff of the Serbian Municipality of Bosanski Samac has been established and that with the assistance from members of the Serb police and the paramilitaries had taken over the vital facilities in town. As the head of the *de facto* government, in the following months,

(element 2), Section (IV)(b)(iii), ICTY Digest. *But see Brdjanin*, (Trial Chamber), September 1, 2004, para. 133 (referring to a “nexus with the armed conflict”).

Blagoje Simic was informed of the persecutory acts against non-Serb civilians, often organized or greatly facilitated by members of the Crisis Staff.”

“The Trial Chamber also accepts that, as a member of the Crisis Staff and as the member of the Exchange Commission, Miroslav Tadic became aware of the forcible takeover and of the following events. Simo Zaric was a member of the 4th Detachment since its establishment and served as the Assistant Commander for Intelligence, Reconnaissance, Morale and Information. In this capacity he was aware of the acts of mistreatment of non-Serb civilians. In view of the above, the Trial Chamber is satisfied that the general requirements of Article 5 are met with respect to each of the Accused.”

d) Underlying offenses

i) murder (Article 5(a))

(1) elements

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 556: “In the jurisprudence of both the Tribunal and the ICTR, murder has consistently been defined as the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.” *See also Krstic*, (Trial Chamber), August 2, 2001, para. 485 (similar); *Blaskic*, (Trial Chamber), March 3, 2000, para. 217 (similar); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 236 (similar).

Brjanin, (Trial Chamber), September 1, 2004, para. 381: “Save for some insignificant variations in expressing the constituent elements of the crime of murder and wilful killing, which are irrelevant for this case, the jurisprudence of this Tribunal has consistently defined the essential elements of these offences as follows:

1. The victim is dead;
2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
3. The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
 - to kill, or
 - to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.”

Brjanin, (Trial Chamber), September 1, 2004, para. 382: “The *actus reus* consists in the action or omission of the accused resulting in the death of the victim. The Prosecution

need only prove beyond reasonable doubt that the accused's conduct contributed substantially to the death of the victim."

Galic, (Trial Chamber), December 5, 2003, para. 150: "The basic requirements for murder as a crime against humanity are that:

- (a) the victim died;
- (b) the victim's death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
- (c) the act was done, or the omission was made, by the accused, or by a person or persons for whose acts or omissions the accused bears criminal responsibility, with an intention:
 - (i) to kill, or
 - (ii) to inflict serious injury, in reckless disregard of human life."

Kapreskic et al., (Trial Chamber), January 14, 2000, para. 560: "The constituent elements of murder under Article 5(a) of the Statute . . . comprise the death of the victim as a result of the acts or omissions of the accused, where the conduct of the accused was a substantial cause of the death of the victim. It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person."

Jelavic, (Trial Chamber), December 14, 1999, para. 35: "Murder is defined as homicide committed with the intention to cause death. The legal ingredients of the offence as generally recognised in national law may be characterised as follows: [a] the victim is dead, [b] as a result of an act of the accused, [c] committed with the intention to cause death."

See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 114: "The elements of murder as a crime against humanity are undisputed."

(2) "murder" under Article 5 of the Statute, compared to Article 2 ("wilful killing") and Article 3 ("murder")

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 556: "The elements of the offence of murder as a crime against humanity and as a violation of the laws or customs of war are the same." See also *Stakic*, (Trial Chamber), July 31, 2003, para. 631 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, paras. 323-324 (similar).

Brđjanin, (Trial Chamber), September 1, 2004, para. 380: "It is clear from the Tribunal's jurisprudence that the elements of the underlying crime of wilful killing under Article 2

of the Statute are identical to those required for murder under Article 3 and Article 5 of the Statute.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 236: “[The] elements [of murder under Article 5] are similar to those required in connection to wilful killing under Article 2 and murder under Article 3 of the Statute, with the exception that in order to be characterised as a crime against humanity a ‘murder’ must have been committed as part of a widespread or systematic attack against a civilian population.”

See also discussion of willful killing under Article 2, Section (I)(d)(i), ICTY Digest, and murder under Article 3, Section (II)(d)(iv), ICTY Digest.

(3) proof of dead body not required

Brđjanin, (Trial Chamber), September 1, 2004, para. 383: “The Trial Chamber concurs with the *Tadić* Trial Chamber that: ‘Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death.’”

Brđjanin, (Trial Chamber), September 1, 2004, para. 385: “In *Krnjelac*, the Trial Chamber held that: ‘Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.’” “The Trial Chamber added that a victim’s death may be established by circumstantial evidence provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused.” (emphasis in original) See also *Krnjelac*, (Trial Chamber), March 15, 2002, para. 326 (same language as quoted).

(4) suicide as murder

Krnjelac, (Trial Chamber), March 15, 2002, para. 329: “The crucial issues [for determining whether suicide can constitute murder] are causation and intent. The relevant act or omission by the Accused or by those for whose acts or omissions the Accused bears criminal responsibility must have caused the suicide of the victim and the Accused, or those for whom he bears criminal responsibility, must have intended by that act or omission to cause the suicide of the victim, or have known that the suicide of the victim was a likely and foreseeable result of the act or omission. The Accused cannot be held criminally liable unless the acts or omissions for which he bears criminal responsibility induced the victim to take action which resulted in his death, and that his

suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence of the conduct of the Accused, or of those for whom he bears criminal responsibility.”

(5) *mens rea*

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 556: Murder must be “committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.” See also *Krstic*, (Trial Chamber), August 2, 2001, para. 485 (similar); *Blaskic*, (Trial Chamber), March 3, 2000, para. 217 (similar); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 236 (similar).

Brdjanin, (Trial Chamber), September 1, 2004, para. 381: “[T]he required mental state is:
The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
- to kill, or
- to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 560: The *mens rea* for murder is that the accused “engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person.”

Jelavic, (Trial Chamber), December 14, 1999, para. 35: “Murder [is] . . . committed with the intention to cause death.”

Compare Galic, (Trial Chamber), December 5, 2003, para. 150: “The [*mens rea*] requirements for murder as a crime against humanity are that:
the act was done, or the omission was made, by the accused, or by a person or persons for whose acts or omissions the accused bears criminal responsibility, with an intention:
(i) to kill, or
(ii) to inflict serious injury, in reckless disregard of human life.”

(a) “murder” not “premeditated murder” is the underlying offense

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 235: “[T]he *Blaskic* Trial Chamber held that ‘it is murder (“meurtre”) and not premeditated murder (“assassinat”) which must be the underlying offence of a crime against humanity.” See also *Blaskic*, (Trial Chamber), March 3, 2000, para. 216 (same).

Jelić, (Trial Chamber), December 14, 1999, para. 51: “The Trial Chamber notes . . . that the English text of the Statute uses the term ‘murder’” and “observes” that “it is appropriate to adopt this as the accepted term in international custom.”

But see Kupreskić et al., (Trial Chamber), January 14, 2000, para. 561: “The requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life. [T]he standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.”

(6) application—murder

(a) Srebrenica

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 569: “[T]he Trial Chamber finds that it has been established beyond reasonable doubt that more than 7,000 Bosnian men any [sic] boys were killed [subsequent to the takeover of Srebrenica] by the members of the [Army of the Republika Srpska] and/or [Ministry of the Interior in Republika Srpska]. It is further proven that the direct perpetrators had the intention to kill or inflict serious injury in the reasonable knowledge that their acts or omissions were likely to cause the death of the victim.”

(b) Sarajevo

Galić, (Trial Chamber), December 5, 2003, para. 599: “The Trial Chamber is . . . satisfied that . . . murder . . . falling within the meaning of Article 5 of the Statute [was] committed in Sarajevo during the Indictment Period [from around 10 September 1992 to 10 August 1994].” For detailed factual findings, see *Galić*, (Trial Chamber), December 5, 2003, paras. 192-594. See also discussion of “campaign of sniping at, and shelling of, civilians in Sarajevo,” Section (II)(d)(xi)(12)(a), ICTY Digest.

(c) Prijedor

Stakić, (Trial Chamber), July 31, 2003, para. 632: “The Trial Chamber is satisfied that, in relation to those killings for which the Trial Chamber has held Dr. Stakić criminally responsible under Article 3 [the deaths of over 1500 Bosnian Muslim and Bosnian Croat non-combatants killed in camps and other detention facilities, during organized convoys by police and/or military units, and committed as a result of armed military and/or police action, in the Municipality of Prijedor in 1992], he is also criminally responsible under Article 5, since it finds that those killings were committed in the context of a widespread and systematic attack directed against the civilian population of the

Municipality of Prijedor and that Dr. Stakic was aware that his acts formed part of that attack.”

ii) extermination (Article 5(b))

(1) relationship to crimes of murder (Articles 3 and 5) and wilful killing (Article 2)

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 571: “The jurisprudence of this Tribunal and the ICTR has on several occasions held that the core elements of extermination are essentially similar to those required for wilful killing under Article 2 and murder under Articles 3 and 5 of the Statute. The scale of the crimes is, however, distinct: extermination is ‘to be interpreted as murder on a larger scale - mass murder.’ The International Law Commission has found that ‘the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder.’”

Brdjanin, (Trial Chamber), September 1, 2004, para. 388: “The jurisprudence of this Tribunal and the ICTR has consistently held that, apart from the question of scale, the core elements of wilful killing (Article 2) and murder (Article 3 and Article 5) on the one hand and extermination (Article 5) on the other are the same.”

(2) elements

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 572: “The Trial Chamber finds that the elements for the crime extermination are as follows:

- a) act or omission that results in the death of persons on a massive scale (*actus reus*), and
- b) the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons (*mens rea*).”

Brdjanin, (Trial Chamber), September 1, 2004, para. 388: “In addition to the preconditions which must be established for a finding of a crime against humanity under Article 5 of the Statute, the elements of the crime of extermination under Article 5(b) are the following:

1. the killing of persons on a massive scale (*actus reus*), and
2. the accused’s intention to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people (*mens rea*).”

Vasiljević, (Trial Chamber), November 29, 2002, para. 229: “[T]he elements of the crime of ‘extermination’ are as follows: 1. The material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals (*actus reus*). 2. The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*).”²²

(3) *actus reus*

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 573: “The *actus reus* of extermination consists of acts or omissions, which directly or indirectly lead to the death of a large number of persons.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 389: “The *actus reus* of the crime of extermination consists of any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.”

Stakić, (Trial Chamber), July 31, 2003, para. 638: “This Trial Chamber agrees with the parties that the core element of extermination is the killing of persons on a massive scale.”

(a) may include acts such as the deprivation of food and medicine, calculated to cause the destruction of part of the population

Brđjanin, (Trial Chamber), September 1, 2004, para. 389: “An act amounting to extermination may include the killing of a victim as such as well as conduct which creates conditions provoking the victim’s death and ultimately mass killings, such as the deprivation of food and medicine, calculated to cause the destruction of part of the population.”

Krstić, (Trial Chamber), August 2, 2001, para. 503: “[F]or the crime of extermination to be established, in addition to the general requirements for a crime against humanity,

²² See ‘no plan or policy requirement/ ‘vast scheme of collective murder’ or ‘vast murderous enterprise’ not an element,’ Section (IV)(d)(iii)(5), ICTY Digest.

there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.” (emphasis added)

(b) number of individuals involved

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 573: “While some Trial Chamber’s have discussed whether the element of mass destruction includes a minimum number of victims, the Trial Chamber finds that there is no such requirement. In the Trial Chamber’s opinion, any such attempt to set a minimum number of victims in the abstract will ultimately prove unhelpful; the element of massive scale must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 391: “The question has often arisen whether the element of killings on a massive scale implies a numerical requirement. The Trial Chamber agrees with the approach adopted by the *Krstić* Trial Chamber that: ‘The very term “extermination” strongly suggests the commission of a massive crime, which in turn assumes a substantial degree of preparation and organisation. . . . [W]hile extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.’ Furthermore, the Trial Chamber recalls that the element of massiveness of the crime allows for the possibility to establish the evidence of the *actus reus* of extermination on an accumulation of separate and unrelated incidents, meaning on an aggregated basis. The Trial Chamber in that respect agrees with the finding of the *Stakić* Trial Chamber, which clarified that the requirement of massiveness as a constitutive element of the *actus reus* of extermination has to be determined on a case-by-case analysis of all relevant factors.”

Stakić, (Trial Chamber), July 31, 2003, para. 640: “This Trial Chamber does not find that the case-law provides support for the Defence submission that the killings must occur on a vast scale in a concentrated place over a short period. Such a claim does not follow from the requirement that the killings must be massive. Nor does the Trial Chamber believe that a specific minimum number of victims is required. As the Trial Chamber in *Prosecutor v. Vasiljević* held, the lowest figure from the Second World War cases to which the crime of extermination was applied was a total of 733 killings. The Chamber added in a however that it does not suggest ‘that a lower number of victims would disqualify that act as “extermination” as a crime against humanity, nor does it suggest that such a threshold must necessarily be met.’ In the opinion of this Trial Chamber, an assessment of whether the element of massiveness has been reached depends on a case-by-case analysis of all relevant factors. As the Trial Chamber in *Krstić* held, the massiveness of the crime automatically assumes a substantial degree of preparation and organisation which may serve as indicia for the existence of a murderous ‘scheme’ or ‘plan,’ but not,

as proposed by the Defence, of a ‘vast scheme of collective murder’ as a separate element of crime.”²³

Vasiljevic, (Trial Chamber), November 29, 2002, para. 227: The “Trial Chamber concludes . . . that criminal responsibility for ‘extermination’ only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect. Responsibility for one or for a limited number of such killings is insufficient.”

Krstic, (Trial Chamber), August 2, 2001, para. 503: “[F]or the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of *a numerically significant part of the population*.” (emphasis added)

Krstic, (Trial Chamber), August 2, 2001, para. 502: “[T]he definition should be read as meaning the destruction of a numerically significant part of the population concerned.”

Compare Krstic, (Trial Chamber), August 2, 2001, para. 501: “[W]hile extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.”

**(i) application—number of victims: at least 1669
Bosnian Muslims and Bosnian Croats killed by
Bosnian Serb forces in the Autonomous Region
of Krajina**

Brđjanin, (Trial Chamber), September 1, 2004, para. 465: Where “at least 1669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces [in the Autonomous Region of Krajina], all of whom were non-combatants,” the Trial Chamber was “satisfied that these killings fulfil the element of massiveness for the crime of extermination.”

²³ As to whether there is a requirement that the killing be part of a “vast murderous enterprise,” see “no plan or policy requirement/ ‘vast scheme of collective murder’ or ‘vast murderous enterprise’ not an element,” Section (IV)(d)(ii)(5), ICTY Digest.

**(c) extermination must be collective, not directed toward
singled out individuals**

Brđjanin, (Trial Chamber), September 1, 2004, para. 390: “[E]xtermination ‘must be collective in nature rather than directed towards singled out individuals. However, in contrast to genocide, the offender need not have intended to destroy the *group* or part of the group to which the victims belong.’” (emphasis in original)

Stakić, (Trial Chamber), July 31, 2003, para. 639: “An act amounting to extermination, as explained by the Trial Chamber in *Prosecutor v. Vasiljević*, ‘must be collective in nature rather than directed towards singled out individuals.’” See also *Vasiljević*, (Trial Chamber), November 29, 2002, para. 227 (source of quoted language).

**(d) responsibility may be remote or indirect/ not required to
prove the accused had *de facto* control over a large number
of individuals**

Brđjanin, (Trial Chamber), September 1, 2004, para. 390: “Criminal responsibility for extermination can also be established in situations where the accused’s participation in mass killings is remote or indirect. This Trial Chamber also recalls that, although ‘the charge of extermination seems to have been restricted to individuals who, by reason of either their position or authority, could decide upon the fate or had control over a large number of individuals,’ the Prosecution is not required to prove that the accused had *de facto* control over a large number of individuals because of his position or authority.”

(4) *mens rea*

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 574: “[T]he *mens rea* required for the crime of extermination consists of the intent to kill persons on a massive scale or to inflict serious bodily injury or create conditions of life that lead to the death of a large number of individuals.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 392-393, 395: “The *mens rea* of the crime of extermination has not been defined consistently in the jurisprudence of this Tribunal and of the ICTR. In general, three approaches can be differentiated. The first approach was articulated by the *Kayishema and Ruzindana* Trial Chamber The second approach was formulated by the *Krstić* Trial Judgement The *Stakić* Trial Chamber has refined this second approach” “The third approach was adopted by the *Vasiljević* Trial Chamber” “The Trial Chamber . . . endorses the *mens rea* formulation as identified in the *Krstić* and *Stakić* Trial Judgements as the correct legal one for the final determination of the factual findings in this case. The *mens rea* standard for extermination is the same as the *mens rea* required for murder as a crime against humanity with the difference that ‘extermination can be said to be murder on a massive scale.’”

The Prosecution is thus required to prove beyond reasonable doubt that the accused had the intention to kill persons on a massive scale or to create conditions of life that led to the death of a large number of people. The *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused's act or omission must be done with intention or recklessness (*dolus eventualis*)."

Stakić, (Trial Chamber), July 31, 2003, paras. 641-642: "[T]his Trial Chamber finds that the *mens rea* required for extermination is that the perpetrator intends to kill persons on a massive scale or to create conditions of life that lead to the death of large numbers of individuals. This includes the requirement that the perpetrator's mental state encompasses all objective elements of the crime: the annihilation of a mass of people."

"Relying on the Judgement of the Trial Chamber in *Prosecutor v. Kayishema*, the Prosecution argues that an accused can be held liable for his acts or omissions if they have been committed 'with intention, recklessness, or gross negligence.' This Trial Chamber does not agree and finds that it would be incompatible with the character of the crime of extermination and with the system and construction of Article 5 if recklessness or gross negligence sufficed to hold an accused criminally responsible for such a crime. It therefore considers that the threshold for the *mens rea* cannot be lower than the intent required for murder as a crime against humanity (i.e. *dolus directus* or *dolus eventualis*)."

Krstić, (Trial Chamber), August 2, 2001, para. 495: "The offences of murder and extermination have a similar element in that they both intend the death of the victims. They have the same *mens rea*, which consists of the intention to kill or the intention to cause serious bodily injury to the victim which the perpetrator must have reasonably foreseen was likely to result in death."

Compare Vasićević, (Trial Chamber), November 29, 2002, paras. 228, 229 (requiring knowledge that actions are part of a "vast murderous enterprise"), discussed in Section (IV)(d)(ii)(5), ICTY Digest.

(a) discriminatory intent not required

Krstić, (Trial Chamber), August 2, 2001, para. 500: "[E]xtermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent nor intention to destroy the group as such on national, ethnic, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnic, racial or religious characteristics."

See also regarding crimes against humanity, "discriminatory intent only required for persecution," Section (IV)(b)(vi)(1)(b), ICTY Digest.

(5) no plan or policy requirement/ “vast scheme of collective murder” or “vast murderous enterprise” not an element

Krstić, (Appeals Chamber), April 19, 2004: “The Trial Chamber also concluded that the definitions of intent for extermination and genocide ‘both require that the killings be part of an extensive plan to kill a substantial part of a civilian population.’ The Appeals Chamber has explained, however, that ‘the existence of a plan or policy is not a legal ingredient of the crime’ of genocide. While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence. Similarly, the Appeals Chamber has rejected the argument that the legal elements of crimes against humanity (which include extermination) require a proof of the existence of a plan or policy to commit these crimes. The presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic, but it is not a legal element of a crime against humanity. As neither extermination nor genocide requires the proof of a plan or policy to carry out the underlying act, this factor cannot support the Trial Chamber’s conclusion that the offence of extermination is subsumed in genocide.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 576: “The Appeals Chamber held in the *Krstić* case that extermination does not require the proof of a plan or policy to carry out the underlying act, adding that the presence of such a plan or policy may be important evidence of the widespread or systematic nature of the attack. In view of this holding, the *Brđjanin* Trial Chamber recently found that ‘the *Vasićević* “knowledge that [the offender’s] action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed,” if proven, will be considered as evidence tending to prove the accused’s knowledge that his act was part of a widespread or systematic attack against a civilian population, and not beyond that.’ This Trial Chamber endorses this view and does not consider the existence of a ‘vast scheme of collective murder’ or ‘vast murderous enterprise’ as a separate element of the crime nor as an additional layer of the *mens rea* required for the commission of the crime.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 394: “*Krstić* Appeal Judgement has crystallised the legal position on the matter in stating that for the purpose of extermination, no proof is required of the existence of a plan or policy to commit that crime. In its decision, the Appeals Chamber added that the presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic. In view of this pronouncement, the Trial Chamber makes it clear that the *Vasićević* ‘knowledge that his action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed,’ if proven, will be considered as evidence tending to prove the accused’s knowledge that his

act was part of a widespread or systematic attack against a civilian population, and not beyond that.”

Stakić, (Trial Chamber), July 31, 2003, para. 640: “As the Trial Chamber in *Krstić* held, the massiveness of the crime automatically assumes a substantial degree of preparation and organisation which may serve as indicia for the existence of a murderous ‘scheme’ or ‘plan,’ but not, as proposed by the Defence, of a ‘vast scheme of collective murder’ as a separate element of crime.”

But see Vasiljević, (Trial Chamber), November 29, 2002, paras. 228, 229: “[I]t is not sufficient to establish extermination for the offender to have intended to kill a large number of individuals, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death as in the case of murder. He must also have known of the vast scheme of collective murder and have been willing to take part therein.”

“The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*).”

(6) application—extermination

(a) Srebrenica—killing more than 7,000 thousand Bosnian Muslim men and boys was extermination

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 577: “The Trial Chamber finds that the killings [subsequent to the fall of Srebrenica] were part of one murder operation, which led to the death of more than 7,000 thousands [sic] Bosnian Muslim men and boys. The crime of extermination in the present case is clearly indicated by the massive scale of the number of victims and by the intent of the perpetrators to kill on massive scale. The Trial Chamber inferred this intent from the nature of the murder operation, which . . . was carried out in a short time period, with similar pattern of killings, in locations near to each other and by perpetrators who in some cases were active in more than one of these locations.”

**(b) Prijedor—killing more than 1,500, including at the
Keraterm camp, at Koricanske Stijene on Mount Vlasic,
and the village of Brisevo was extermination**

Stakic, (Trial Chamber), July 31, 2003, para. 651-655: “The Indictment . . . charges the Accused with a number of killings committed in Prijedor municipality between 30 April and 30 September 1992.”

“[T]he proven large-scale killings were of three kinds: 1) killings committed in camps and other detention facilities, 2) killings committed during organised convoys by police and/or military units, and 3) killings committed as a result of armed military and/or police action in non-Serb or predominantly non-Serb areas of the municipality.”

“The evidence shows that the proven killings, many of which independently would reach the requisite level of massiveness for the purposes of an evaluation under Article 5(b) of the Statute, were aimed at the collective group of targeted individuals and not at the victims in their individual capacity. This holds true *inter alia* for:

- a) the massacre in Room 3 of the Keraterm camp;
- b) the killings of around 120 men who were called out in an organised fashion on 5 August in the Keraterm camp;
- c) the closely controlled and cold-blooded executions at Koricanske Stijene on Mount Vlasic on 21 August 1992;
- d) the Serb armed attack on the mainly Croat village of Brisevo, which started on 27 May 1992.”

“Although the total number of victims of the killings . . . for which Dr. Stakic incurs criminal liability, can never be accurately calculated, the Trial Chamber finds that based on a conservative estimate, more than 1,500 persons were killed. Considering the scale of the killings and in an effort not to lose sight of the fact that these crimes were committed against individual victims, the Trial Chamber has included a List of Victims known by name, in which are enumerated the names of those persons identified as killed in Prijedor municipality in 1992, in total 486 human beings.”

“The Trial Chamber therefore considers that the killings committed in the Municipality of Prijedor during the relevant period of 1992 were part of a campaign of annihilation of non-Serbs carried out by Serb police and military forces, and that the killings thus perpetrated fulfil the requisite element of massiveness for the purposes of Article 5(b) of the Statute. It is proven that acts of extermination were committed by the Accused.”

**(i) application—*mens rea*—extermination:
Prijedor**

Stakic, (Trial Chamber), July 31, 2003, para. 661: “Killings were perpetrated on a massive scale against the non-Serb population of Prijedor municipality. The lives of the non-Serb population were of very little, if any, value to the Serb perpetrators. The Trial Chamber has found that the Accused, because of his political position and role in the

implementation of the plan to create a purely Serb municipality, was familiar with the details and the progress of the campaign of annihilation directed against the non-Serb population. Dr. Stakic was aware of the killings of non-Serbs and of their occurrence on a massive scale. The Trial Chamber is therefore convinced that the Accused acted with the requisite intent, at least *dolus eventualis*, to exterminate the non-Serb population of Prijedor municipality in 1992 and finds the Accused guilty of this crime, punishable under Article 5(b) of the Statute.”

(7) extermination distinguished from genocide

Stakic, (Trial Chamber), July 31, 2003, para. 639: “Extermination must form part of a widespread or systematic attack against a civilian population. An act amounting to extermination, as explained by the Trial Chamber in *Prosecutor v. Vasiljevic*, ‘must be collective in nature rather than directed towards singled out individuals. However, in contrast to genocide, the offender need not have intended to destroy the *group* or part of the group to which the victims belong,’ and it is not required that the victims share national, ethnical, racial or religious characteristics. In this context it should be emphasised that the crime of extermination may apply to situations where some members of a group are killed but others spared. It suffices that the victims be defined by political affiliation, physical attributes or simply the fact that they happened to be in a certain geographical area. Moreover, the victims may be defined in the negative, *i.e.* as not belonging to, not being affiliated with or not loyal to the perpetrator or the group to which the perpetrator belongs.” (emphasis in original)

iii) enslavement (Article 5(c))

(1) *actus reus* and *mens rea*

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 116: “[T]he *actus reus* of the violation [of enslavement] is the exercise of any or all of the powers attaching to the right of ownership over a person,’ and the ‘*mens rea* of the violation consists in the intentional exercise of such powers.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 350: “Enslavement under Article 5 . . . has been defined by the Tribunal as the exercise of any or all of the powers attaching to the right of ownership over a person. The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers.”

(2) same as “slavery” under Article 3

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 85: “Trial Chambers of the Tribunal have held that the charge of ‘forced labour assignments’ may constitute the basis of the crime of enslavement as a crime against humanity under Article 5(c), and the offence of slavery as a violation of the laws or customs of war under Article 3 of the Statute . . .”

Krnjelac, (Trial Chamber), March 15, 2002, para. 356: “The Trial Chamber is satisfied that the offence of slavery under Article 3 . . . is the same as the offence of enslavement under Article 5. As such, slavery under Article 3 requires proof of the same elements as constitute enslavement under Article 5.”

(3) indicia of enslavement

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 119: In determining whether enslavement has been established, the indicia of enslavement identified by the Trial Chamber include: “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 359: “[T]he exaction of forced or compulsory labour or service’ is an ‘indication of enslavement,’ and a ‘factor to be taken into consideration in determining whether enslavement was committed.”

(a) keeping someone in captivity usually not enough

Kumarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 542: “Detaining or keeping someone in captivity, without more, [existence of other indications of enslavement] would, depending on the circumstances of a case, usually not constitute enslavement.” “Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.”

(b) duration of enslavement is a factor, but not a required element

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, paras. 121, 356: “The duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship.” “[D]uration may be a factor ‘when considering whether someone was enslaved.’ This means that

duration is not an element of the crime, but a factor in the proof of the elements of the crime. The longer the period of enslavement, the more serious the offence.”

(4) lack of resistance is not a sign of consent; lack of consent is not an element

Kumarac, Kovac, and Vokotic, (Appeals Chamber), June 12, 2002, para. 120: “The ‘lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention’ cannot be interpreted as a sign of consent. Lack of consent is not an element of the crime of enslavement.

(5) forced labor assignments may constitute slavery

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 85-87: “Trial Chambers of the Tribunal have held that the charge of ‘forced labour assignments’ may constitute the basis of the crime of enslavement as a crime against humanity under Article 5(c), and the offence of slavery as a violation of the laws or customs of war under Article 3 of the Statute, and as such this offence is of sufficient gravity to support a charge of persecution.” “The underlying acts of the charge of ‘forced labour assignments’ infringe upon certain provisions of Geneva Conventions III and IV, and as such may constitute a violation of the laws or customs of war other than grave breaches of the Geneva Conventions, falling within the scope of Article 3 of the Statute. It is settled case-law of the Tribunal that the law of the Geneva Conventions is part of customary international law.” “International humanitarian law generally prohibits forced or involuntary labour in international, as well as internal armed conflicts.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 359: “[T]he exaction of forced or compulsory labour or service’ is an ‘indication of enslavement,’ and a ‘factor to be taken into consideration in determining whether enslavement was committed.’”

For discussion of “forced labor” as a form of slavery under Article 3, see (II)(d)(xiv)(3), ICTY Digest. For discussion of forced labor as a form of cruel treatment under Article 3, see (II)(d)(iii)(6)(b), ICTY Digest.

For discussion of forced labor underlying the crime of persecution, see Article 5, Section (IV)(d)(viii)(3)(p), ICTY Digest.

iv) deportation (Article 5(d))

(1) defined

Brđjanin, (Trial Chamber), September 1, 2004, para. 544: “The Trial Chamber by a majority vote is satisfied that the *actus reus* of ‘deportation’ under Article 5(d) of the Statute consists of the forcible displacement of individuals across a State border from the area in which they are lawfully present without grounds permitted under international law”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 122: “Trial Chambers of the Tribunal have held in several judgements that deportation is defined as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds. . . . The Trial Chamber agrees with these findings.”

Stakić, (Trial Chamber), July 31, 2003, para. 672: “The Trial Chamber in the *Krnjelac* case noted that deportation is clearly and specifically prohibited under the law as a crime against humanity and has long been so and that deportation was defined as ‘the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’ It added the requirement that the persons deported be displaced across a national border”

See also Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 121: “Both deportation and unlawful or forcible transfer relate to the involuntary and unlawful displacement, or movement, or relocation, or removal of persons from the territory in which they reside.”

See also Stakić, (Trial Chamber), July 31, 2003, para. 681: “Any forced displacement of population involves ‘abandoning one’s home, losing property and being displaced under duress to another location.’”

(2) distinction between deportation and forcible transfer

Brđjanin, (Trial Chamber), September 1, 2004, para. 544: “[D]isplacement within the boundaries of a State constitutes ‘forcible transfer,’ punishable as ‘other inhumane acts’ pursuant to Article 5(i) of the Statute.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 122: “Forcible transfer has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders.”

Stakić, (Trial Chamber), July 31, 2003, para. 671: “The jurisprudence of this Tribunal has drawn a distinction between deportation under Article 5(d) of the Statute and other inhumane acts (forcible transfer) under Article 5(f) of the Statute. This distinction was set out in *Krstić*, where the Trial Chamber ruled that “[b]oth deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.”

Stakić, (Trial Chamber), July 31, 2003, para. 672: “[The Trial Chamber in the *Knojelec* case] added the requirement that [for the crime of deportation] the persons deported be displaced across a national border in order ‘to be distinguished from forcible transfer which may take place within national boundaries.’”

See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 122: “In *Knojelec* the Trial Chamber found that the concept of expulsion formed part of the definition of deportation, and may be treated in the same way as deportation.”

(3) transfer over *de facto* boundaries that are not internationally recognized, such as constantly changing frontlines

Brđjanin, (Trial Chamber), September 1, 2004, para. 542: “The Trial Chamber by a majority vote is unable to agree with the *Stakić* approach. Significant evidence has been advanced in previous judgements of this Tribunal to the effect that, under customary international law, ‘deportation’ requires that an internationally recognised border be crossed. While the *Stakić* Trial Judgement (and the Prosecution’s Final Brief in the instant case) may advance excellent policy arguments in favour of dispensing with a cross-border element for the crime of deportation, the Trial Chamber is not convinced that this reflects customary international law as it stood at the relevant time. It is customary international law, and not policy, which the Trial Chamber is bound to apply. The Trial Chamber therefore maintains the cross-border element as a criterion in order to distinguish between ‘deportation’ and ‘forcible transfer.’”

But see Stakić, (Trial Chamber), July 31, 2003, paras. 677-679, 684: “The Trial Chamber is . . . of the view that it is the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal. The Trial Chamber believes that, should a definite destination requirement be specified, it would often be difficult to determine whether and when the crime occurred because the victims may have been transferred in several stages and therefore through several territories and

across borders that may have changed every day. A fixed destination requirement might consequently strip the prohibition against deportation of its force.”

“[I]t would make little or no sense to prohibit acts of deportation, in the words of the Security Council, ‘regardless of whether they are committed in an armed conflict, international or internal in character’ and at the same time to limit the possibility of punishment to cases involving transfers across internationally recognised borders only.”

“For the purposes of the present case, the Trial Chamber finds that Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognised. The crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party.”

“[I]n the context of the Statute the question of whether a border was internationally recognised or merely *de facto* is immaterial. To hold otherwise would not sufficiently take into account the broader meaning of the word, the initial concept, the legislator’s purpose and the sense and spirit of the norm. The Trial Chamber emphasizes that the underlying act – i.e. irrespective of whether the displacement occurred across an internationally recognized border or not – was already punishable under public international law by the time relevant to the present case. The Trial Chamber points to the fact that the International Military Tribunal at Nuremberg, on the basis of Article 6(c) of the Nuremberg Charter referring to ‘deportations’ as a crime against humanity, applied this provision *de facto* in cases where victims were displaced within internationally recognised borders.”

See also Krnojelac, (Appeals Chamber), Separate Opinion of Judge Schomburg, September 17, 2003, para. 15: “The question of whether a border is internationally recognised or merely *de facto* is immaterial. This was also the approach taken by the International Military Tribunal at Nuremberg and the District Court of Jerusalem in the case of *Attorney General v. Adolf Eichmann*.”

(4) unlawful character of the displacement—when displacement is involuntary

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 125: “The displacement of persons is only illegal where it is forced, i.e. not voluntary, and ‘when it occurs without grounds permitted under international law.’ In other words, displacement motivated by an individual’s own genuine wish to leave an area is lawful. The requirement that the displacement be forced or forcible has been interpreted broadly by Trial Chambers. The term ‘forced’ is not limited to physical force; it may also include the ‘threat of force or coercion, such as that caused by fear of violence, duress,

detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.’ The essential element is that the displacement be *involuntary* in nature, that ‘the relevant persons had *no real choice*.’ In other words, a civilian is involuntarily displaced if he is ‘not faced with a genuine choice as to whether to leave or to remain in the area.’ As noted by the *Krnjelac* Trial Chamber, an apparent consent induced by force or threat of force should not be considered to be real consent” (emphasis in original)

Stakić, (Trial Chamber), July 31, 2003, para. 682: “The definition of deportation requires ‘forced’ or ‘forcible’ displacement. Thus, transfers based on an individual’s free will to leave are lawful. In the jurisprudence, the requirement of ‘forced displacement’ has been interpreted to refer not only to acts of physical violence but also to other forms of coercion. The Trial Chamber in *Krstić* made reference to the Elements of Crimes for the International Criminal Court which provides that the term ‘forcibly:’

is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”

See *Krstić*, (Trial Chamber), August 2, 2001, para. 529 (source of quoted language).

(5) assistance by humanitarian agencies does not render displacement lawful

Stakić, (Trial Chamber), July 31, 2003, para. 683: “The Trial Chamber emphasises that, with regard to a subsequent legal evaluation of the behaviour of a warring party, assistance by humanitarian agencies is not a factor rendering a displacement lawful.”

(6) need not involve a minimum number of individuals

Stakić, (Trial Chamber), July 31, 2003, para. 685: “[A] minimum number of individuals [need not] have been forcibly transferred for the perpetrator to incur criminal responsibility. [Such a] submission finds no support in the case-law of this Tribunal and is tantamount to negating the protective effect of the prohibition against deportation.”

(7) return of victim has no impact on criminal responsibility

Stakić, (Trial Chamber), July 31, 2003, para. 687: “If a victim were to return, this would consequently not have an impact on the criminal responsibility of the perpetrator who removed the victim.”

(8) *mens rea*

Stakić, (Trial Chamber), July 31, 2003, paras. 686-687: “For this Trial Chamber, all the objective elements . . . must be covered by the intent of the perpetrator. This approach is fully consonant with the aim of prohibiting the practice of ethnic cleansing.” “The Trial Chamber agrees with the Trial Chamber in the *Prosecutor v. Mladen Naletilić and Vinko Martinović* that the intent of the perpetrator must be that the victim is ‘removed, which implies the aim that the person is not returning.’”

(9) application—deportation

(a) deportation of the non-Serb population from the Municipality of Prijedor

Stakić, (Trial Chamber), July 31, 2003, paras. 814, 712: “‘Deportation’ under Article 5(d) of the Statute has already been established beyond reasonable doubt. The Trial Chamber is convinced that the deportations of non-Serb population from Prijedor municipality took place throughout the period relevant to the Indictment.”

“[T]he Trial Chamber is convinced that the Accused intended to deport the non-Serb population from Prijedor municipality and that, based on this intent, he not only committed the crime of deportation as a co-perpetrator, but also planned and ordered this crime. The Trial Chamber consequently finds the Accused guilty of the crime of deportation, a crime against humanity under Article 5(d) of the Statute.” *See also Stakić*, (Trial Chamber), July 31, 2003, paras. 314-334, for detailed facts as to the deportation and forcible transfer of the non-Serb population.

(b) deportation of non-Serb civilians from the Municipality of Bosanski Samac to Croatia

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, paras. 1051-1053: “[T]he Trial Chamber is satisfied beyond reasonable doubt that Blagoje Simić is criminally responsible as a perpetrator of the deportation of [16 individuals].”

“The Trial Chamber is also satisfied that it has been proven beyond reasonable doubt that Miroslav Tadić is criminally responsible as a perpetrator for the deportation of [16 individuals from their homes in the Municipality of Bosanski Samac]. The Trial Chamber finds that sufficient evidence has been adduced to prove that Miroslav Tadić had the *actus reus* of deportation of the above-mentioned non-Serb civilians.”

“With regard to his *mens rea*, the Trial Chamber does not accept Miroslav Tadić’s statements that he never wished that some of his fellow citizens would leave forever, and that there was always a possibility to return. The Trial Chamber is satisfied beyond reasonable doubt that the Prosecution has adduced sufficient evidence to prove that Miroslav Tadić had the intent to permanently displace non-Serb civilians from their

homes in the Municipality of Bosanski Samac. The Majority is satisfied that the only inference from his substantial and continuing activity in the exchange of non-Serb civilians is that Miroslav Tadic had the intent that these non-Serb civilians are not returning, or that he at least knew that his actions were likely to permanently displace these non-Serb civilians and was reckless thereto.”

But see Simic, Tadic, and Zaric, (Trial Chamber), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, October 17, 2003, para. 27: “I am convinced that Miroslav Tadic sincerely believed that the exchanges [from Bosanski Samac] were the only means to get the non-Serb civilians out of their miserable and – in many cases – terrifying living conditions, and that he helped them to a better life. As Miroslav Tadic stated at the closure of the case: ‘I thought I was doing something humane, helping people in distress.’ His participation in their deportation helped them to exercise their right to freedom to a greater degree than during their detention and avoided the constant danger to the life and limb of the non-Serb prisoners in the detention facilities in Bosanski Samac. Furthermore, it has not been made out on the evidence that any other adequate means was available to Miroslav Tadic to free the non-Serb civilians from the situation they were in.”

(i) involuntary character of the exchanges/ lack of genuine consent

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 967, 968: “The Trial Chamber accepts the evidence that some of the non-Serb civilians who were to be exchanged were asked whether they wanted to cross over to the other side. This, however, does not necessarily indicate that these persons voluntarily agreed to be exchanged, as they could have been left without a genuine choice as to whether to leave or to remain in the area when they made their statement. In this context, the Trial Chamber notes the atmosphere of terror and fear created for the non-Serbs who were taken from their homes and held in various detention centres in the municipality of Bosanski Samac and in other locations. When these detainees had to state whether or not they wanted to be exchanged, they were not given guarantees that they would not be mistreated again. The Trial Chamber also accepts the evidence that some of the non-Serb civilians who were exchanged were not asked whether they wanted to be exchanged. In the view of the Trial Chamber, this is a strong indicator that these civilians were not voluntarily exchanged.”

“The Trial Chamber accepts the evidence on the seven exchanges from Bosanski Samac and Batkovic to Croatia The Trial Chamber finds that the displacement of the witnesses involved in these exchanges constitutes unlawful deportation, as the witnesses were forcibly relocated. In this respect, the Trial Chamber reiterates that the term ‘force’ is not limited to physical force. Instead, the essential requirement is that the relocation is involuntary in nature, i.e., that the victim does not

have a real choice. . . . The detention conditions constituted a coercive environment that left the detainees without a real choice as to whether or not they wanted to be exchanged. . . . The Trial Chamber is satisfied that there was no justification for the deportation of the above-mentioned witnesses.”

Compare Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1033: “The Trial Chamber finds that none of the Accused is criminally responsible for forcibly transferring non-Serb prisoners from one detention facility to another, as the Trial Chamber is not satisfied that the Accused had the intent to permanently displace these prisoners.”

For findings as to transfers of non-Serb prisoners between detention centers within Serb-held territory in Bosnia and Herzegovina, see *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, paras. 973-977.

For discussion of “unlawful deportation or transfer or unlawful confinement of a civilian” under Article 2, see (I)(d)(vii), ICTY Statute. For discussion of deportation as an underlying means of committing persecution under Article 5(h) of the Statute, see Section (IV)(d)(viii)(3)(e), ICTY Digest. For discussion of forcible transfer as an “other inhumane act” under Article 5(f) of the Statute, see Section (IV)(d)(ix)(6)(a), ICTY Digest.

v) imprisonment (Article 5(e))

(1) elements

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 114-115: “The Appeals Chamber notes the finding of the Trial Chamber that imprisonment of civilians is unlawful where

- civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.* that they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;
- the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified; and
- the imprisonment occurs as part of a widespread or systematic attack directed against a civilian population.”

“[T]he existence of an international armed conflict, an element of Articles 42 and 43 of Geneva Convention IV, is not required for imprisonment as a crime against humanity.”

Simic, Tadic, and Zarić (Trial Chamber), October 17, 2003, para. 64: “The Trial Chamber considered that deprivation of an individual’s liberty is arbitrary if imposed without due process of law. The Trial Chamber outlined the following elements to establish a crime of imprisonment (or unlawful confinement) as a crime against humanity under Article 5 (e) of the Statute:

1. An individual is deprived of his or her liberty.
2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.”

See also Krnojelac, (Trial Chamber), March 15, 2002, para. 115 (same elements).

(2) requires “arbitrary” imprisonment

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 116: “The Appeals Chamber agrees with the Trial Chamber’s finding ‘that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.’”

Simic, Tadic, and Zarić (Trial Chamber), October 17, 2003, para. 64: “The Trial Chamber in *Kordić* concluded that imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, defined as ‘deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against the civilian population.’ The Trial Chamber in *Krnojelac* held that ‘any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5 (e) as long as the other requirements of the crime are fulfilled.’”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 302: “[T]he term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population.”

(3) same elements as “unlawful confinement” under Article 2

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 63: “The Trial Chamber in *Kordić* held that the elements of the crime of unlawful confinement under Article 2 of the Statute, and the elements of the crime of imprisonment under Article 5 of the Statute are identical. The Trial Chamber in the *Krnjelac* Judgement shared this view, but also considered that as a crime against humanity, the definition of imprisonment was not restricted by the grave breaches provisions of the Geneva Conventions.”

See “unlawful deportation or transfer or unlawful confinement of a civilian” under Article 2, Section (I)(d)(vii), ICTY Digest. For discussion of unlawful confinement underlying the crime of persecution, see Section (IV)(d)(viii)(3)(d), ICTY Digest.

vi) torture (Article 5(f))

(1) same regardless of Article

Brđjanin, (Trial Chamber), September 1, 2004, para. 482: “The definition of ‘torture’ remains the same regardless of the Article of the Statute under which the Accused has been charged.” See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 79 (similar).

(2) elements

Kumarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 142: The definition [of torture] is based on the following constitutive elements: “(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 481 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 79 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 179 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 750 (same elements).

(3) requirement of severe pain and suffering

Kumarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 142: The first element for the crime of torture is “[t]he infliction, by act or omission, of severe pain or suffering, whether physical or mental.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 483: “The seriousness of the pain or suffering sets torture apart from other forms of mistreatment. The jurisprudence of this Tribunal and of the ICTR has not specifically set the threshold level of suffering or pain required for the crime of torture, and it consequently depends on the individual circumstances of each case.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 484: “In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 80: “The expression ‘severe pain or suffering’ requires that ‘only acts of substantial gravity may be considered to be torture,’ therefore, ‘[n]either interrogation by itself, nor minor contempt for the physical integrity of the victim, satisfies this requirement.’ As stated in the *Krnjelac* Trial Judgement, when assessing the seriousness of the acts charged as torture, a Trial Chamber must consider:

[a]ll the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.”

(a) rape necessarily implies severe pain or suffering

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, paras. 149, 150: “[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is . . . such an act. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.” “Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 485: “Some acts, like rape, appear by definition to meet the severity threshold. Like torture, rape is a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person. Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 145: “[R]ape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.”

See also discussion of rape and other forms of sexual violence constituting the war crime of torture under Article 3, Section (II)(d)(i)(8)(a), ICTY Digest.

(4) requirement of a prohibited purpose

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 142: “The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.” See also *Krnjelac*, (Trial Chamber), March 15, 2002, para. 179 (same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 486: “Acts of torture aim, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even a very severe infliction of pain would not qualify as torture for the purposes of Article 2 and Article 5 of the Statute.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 81: “The act of torture must have been committed deliberately and for one of the prohibited purposes outlined in the definition”

Delalić et al., (Trial Chamber), November 16, 1998, para. 470: The prohibited purposes listed in the Torture Convention “do not constitute an exhaustive list, and should be regarded as merely representative.”

(a) prohibited purpose need not be the predominating or sole purpose

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 155: “[A]cts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 487: “The prohibited purposes [of aiming at obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person] do not constitute an exhaustive list, and there is no requirement that the conduct must *solely* serve a prohibited purpose. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose is immaterial.” (emphasis in original)

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 81: “It is sufficient that one of the prohibited purposes forms part of the motivation behind the conduct, and it need not be the ‘predominant or sole purpose.’”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 153: “[T]he prohibited purpose need be neither the sole nor the main purpose of inflicting the severe pain or suffering.”

Delalić et al., (Trial Chamber), November 16, 1998, para. 470: “[I]here is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”

(5) role of a state official not necessary

Kumarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 148: “[T]he public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 488, 489: “Even though the [Convention Against Torture] envisages that torture be committed ‘with the consent or acquiescence of a public official or other person acting in an official capacity,’ the jurisprudence of this Tribunal does not require that the perpetrator of the crime of torture be a public official, nor does the torture need to have been committed in the presence of such an official.”

“[T]he Trial Chamber notes that the definition of the [Convention Against Torture] relies on the notion of human rights, which is largely built on the premises that human rights are violated by States or Governments. For the purposes of international criminal law, which deals with the criminal responsibility of an individual, this Trial Chamber agrees with and follows the approach of the *Kumarac* Trial Chamber that ‘the characteristic trait of the offence [under the Tribunal’s jurisdiction] is to be found in the nature of the act committed rather than in the status of the person who committed it.’”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 82: “The presence or involvement of a state official or any other authority-wielding person in the process of torture is not necessary for the offence to be regarded as ‘torture.’”

Kročka et al., (Trial Chamber), November 2, 2001, para. 139: “[T]he state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.”

(6) *mens rea*

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 142: “The act or omission must be intentional.” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 481 (same); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 79 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 179 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 750 (same).

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 153: “[E]ven if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”

(7) distinction between cruel and inhumane treatment as an underlying act of persecution, and torture

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 83: “The Trial Chamber notes that beatings committed on discriminatory grounds and causing severe pain or suffering, physical or mental, constitute cruel and inhumane treatment as an underlying act of persecution. The deliberate infliction of severe physical or mental pain or suffering through beatings in order to discriminate [*sic*] a victim constitutes torture.”

See also discussion of torture under Article 3, Section (II)(d)(i), ICTY Digest; torture as an underlying crime of persecution, Section (IV)(d)(viii)(3)(h), ICTY Digest; torture or inhuman treatment under Article 2, Section (I)(d)(ii), ICTY Digest; cruel treatment under Article 3, Section (II)(d)(iii), ICTY Digest.

vii) rape (Article 5(g))

Kunarac, Kovac, and Vokotic, (Appeals Chamber), June 12, 2002, paras. 127-129: After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, the Trial Chamber concluded: "[T]he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim." "Resistance" is not a requirement. "Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape." "[T]here are 'factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.' A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force."

Kvočka et al., (Trial Chamber), November 2, 2001, paras. 175, 180: "Rape was succinctly defined in the *Akayesu* Trial Chamber Judgement as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'" "[S]exual violence is broader than rape and includes such crimes as sexual slavery or molestation. Moreover, the *Akayesu* Trial Chamber emphasized that sexual violence need not necessarily involve physical contact and cited forced public nudity as an example."

See also discussion of rape under Article 3, Sections (II)(d)(i)(8)(a) and (II)(d)(ii), ICTY Digest. See also discussion of rape as an underlying crime of persecution, Section (IV)(d)(viii)(3)(i), ICTY Digest.

viii) persecution (Article 5(h))

(1) elements

Deronjic, (Appeals Chamber), July 20, 2005, para. 109: "With regard to the crime of persecutions, the Appeals Chamber . . . recalls that this crime is defined as 'an act or omission which: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).'" See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, paras. 320, 454; *Kordic and Cerkez*, (Appeals

Chamber), December 17, 2004, paras. 101, 671; *Blaskic* (Appeals Chamber), July 29, 2004, para. 131; *Vasiljevic* (Appeals Chamber) February 25, 2004, para. 113; *Krnjelac* (Appeals Chamber), September 17, 2003, para. 185; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 579; *Brđjanin*, (Trial Chamber), September 1, 2004, para. 992; *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 47; *Stakic*, (Trial Chamber), July 31, 2003, para. 732 (same elements for all).

Krocka et al., (Appeals Chamber), February 28, 2005, paras. 319-320: “Referring to the case-law of the Tribunal, the Trial Chamber defined the constitutive elements of the crime of persecution as follows: ‘(1) the occurrence of a discriminatory act or omission; (2) a basis for that act or omission founded on race, religion, or politics; and (3) the intent to infringe an individual’s enjoyment of a basic or fundamental right’ and, in more general terms, defined persecutions as ‘the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.’” “The Appeals Chamber finds no error in the constitutive elements identified by the Trial Chamber but prefers to adopt the wording of the *Krnjelac* Appeal Judgement”

Prosecutor v. Momir Nikolic, Case No. IT-02-60/1-S (Trial Chamber), December 2, 2003, para. 16: The elements of Article 5(h) are: “(a) the existence of an armed conflict during the time alleged in the Indictment; (b) a widespread or systematic attack directed against a civilian population and, in a manner related to that attack, . . . [acts] committed . . . against the civilian population that violated fundamental human rights; (c) . . . conduct . . . committed on political, racial or religious grounds and . . . committed with discriminatory intent; and (d) . . . aware[ness] of the wider context in which [the perpetrator’s] conduct occurred.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 47: “The *Kapreskeic* Trial Chamber defines persecution as ‘the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.’”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 634: “The following elements must be proven to establish that persecution as a crime against humanity has been committed: i) the perpetrator commits a discriminatory act or omission; ii) the act or omission denies or infringes upon a fundamental right laid down in international customary or treaty law; iii) the perpetrator carries out the act or omission with the intent to discriminate on racial, religious or political grounds; iv) the general requirements for a crime against humanity pursuant to Article 5 of the Statute are met.” See also *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 104 (similar); *Prosecutor*

v. Obrenovic, Case No. IT-02-60/2-S (Trial Chamber), December 10, 2003, para. 64 (same).

(2) *actus reus*

(a) persecutory acts include those listed in Article 5, acts found elsewhere in the Statute and acts not expressly prohibited under the Statute

Krnjelac, (Appeals Chamber), September 17, 2003, para. 219: “The Appeals Chamber holds that the crime of persecution may take different forms. It may be one of the other acts constituting a crime under Article 5 of the Statute or one of the acts constituting a crime under other articles of the Statute.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 994: “While a comprehensive list of such acts has never been established, it is clear that persecution may encompass acts which are listed in the Statute, as well as acts which are not listed in the Statute.” *See also Prosecutor v. Deronjic*, Case No. IT-02-61-S (Trial Chamber), March 30, 2004, para. 118; *Stakic*, (Trial Chamber), July 31, 2003, para. 735 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 735 (same as *Stakic*); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 246 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 433 (similar).

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 48: “Not every denial of a fundamental human right is serious enough to constitute a crime against humanity. It is clear that, for the purposes of this Tribunal, persecution may encompass acts which are listed in the Statute, as well as acts which are not listed in the Statute.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 185: “The Tribunal’s caselaw has specified that persecutory acts include those crimes enumerated in other sub-clauses of Article 5, crimes found elsewhere in the Statute, and acts not enumerated in the Statute but which may entail the denial of other fundamental human rights. . . .”

Kupreskic et al., (Trial Chamber), January 14, 2000, paras. 581, 614-615: “[T]he Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. [N]o such requirement is imposed on it by the Statute of the International Tribunal.” “A narrow definition of persecution is not supported in customary international law.” “[P]ersecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 185 (persecution includes “acts not enumerated in the Statute”).

Kapreskic et al., (Trial Chamber), January 14, 2000, paras. 605-606: “[A]cts enumerated in other sub-clauses of Article 5 can . . . constitute persecution. . . . A narrow interpretation of persecution, excluding other sub-headings of Article 5, is . . . not an accurate reflection of the notion of persecution which has emerged from customary international law.” “[I]f persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a *lacuna* would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent ‘to destroy, in whole or in part, a national, ethnical, racial, or religious group.’”

(b) acts or omissions not enumerated in Article 5 must be of equal gravity to those listed

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 102: “[T]he acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute.” See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 321 (similar); *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 671 (same); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 135 (same) and para. 138 (similar) (criticizing Blaskic Trial Chamber); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 199 (same); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 247 (similar); *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 185 (similar).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 580: “It is settled in the jurisprudence of the Tribunal that the acts or omissions that can amount to persecutions not only include acts or omissions enumerated in other sub-clauses of Article 5, but also acts or omissions of equal gravity to the acts listed in Article 5 of the Statute. The requirement of ‘equal gravity’ defines the limits on the types of acts which qualify as persecutions.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 995: “Not every act or omission denying a fundamental right is serious enough to constitute a crime against humanity. While acts or omissions listed under other sub-paragraphs of Article 5 of the Statute are by definition serious enough, others (either listed under other Articles of the Statute or not listed in the Statute at all) must meet an additional test. Such acts or omissions must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute. This test will only be met by gross or blatant denials of fundamental rights.” See also *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 48 (similar).

Đerogović, (Trial Chamber), March 30, 2004, para. 118: “[T]he common denominator of all persecutory acts must be that the acts are committed on the basis of one of the listed discriminatory grounds and must be of an equal gravity as other acts enumerated under Article 5 of the Statute.”

Stakić, (Trial Chamber), July 31, 2003, para. 736: “In order to comply with the principle of *nullum crimen sine lege certa*, there must be ‘clearly defined limits on the types of acts which qualify as persecution.’ The acts of persecution not enumerated in Article 5 or elsewhere in the Statute must be of an equal gravity or severity as the other acts enumerated under Article 5.”

Kupreskić et al., (Trial Chamber), January 14, 2000, paras. 618-619: “[I]n order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution.” “[A]t a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5.” (underlining removed)

Kupreskić et al., (Trial Chamber), January 14, 2000, para. 621: “The Trial Chamber . . . defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.” (underlining removed)

(c) separately or combined, the acts must amount to persecution

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 102: “[T]he acts underlying persecutions as a crime against humanity, *whether considered in isolation or in conjunction with other acts*, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute.” (emphasis added) *See also Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 321 (similar); *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 671 (same); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 135 (same) and para. 138 (similar); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 199 (same).

Krnjelac, (Appeals Chamber), Separate Opinion of Judge Shahabuddeen, September 17, 2003, paras. 6-7: “Under paragraph (h) of the provision, the relevant supporting crime is ‘persecution,’ the underlying act or acts being only evidence of the persecution. It is the ‘persecution’ which must have the same gravity as that of enumerated crimes. The underlying act does not have to be a crime listed in article 5 of the Statute. It does not have to be a crime specified elsewhere in the Statute. Indeed, by itself it does not have

to be a crime specified anywhere in international criminal law: it may be a non-crime. As was recalled in the *Ministries Case*:

The persecution of Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises, they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation, and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered.

Citing that case, the *Krvavica* Trial Chamber later said:

[J]urisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.”

“It follows that an underlying act may not by itself constitute a crime; therefore, there can be no question of its having the same gravity as an enumerated crime. But the act, taken separately or cumulatively with other acts, can give rise to the crime of persecution. The question which then arises is what is the level of persecution that the Statute is concerned with. It is possible that there can be persecution at different levels. It is here, I think, that it would be reasonable to say that the Statute is concerned only with cases in which the level of the gravity of the proven persecution matches the level of the gravity of an enumerated crime.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 582: “The acts or omissions may be evaluated separately or together in their context considering their cumulative effect.” See also *Kupreskic et al.*, (Trial Chamber), January 14, 2000, para. 622 (similar).

Brđanin, (Trial Chamber), September 1, 2004, para. 995: “[A]cts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect. Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.” See also *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 247 (similar).

Prosecutor v. Dragan Nikolic, Case No. IT-94-2-S (Trial Chamber), December 18, 2003, para. 110: “The Trial Chamber reiterates what it stated in *Stakic*:

The acts of persecution not enumerated in Article 5 or elsewhere in the Statute must be of an equal gravity or severity as the other acts enumerated under Article 5. When considering whether acts or omissions satisfy this threshold, they should not be considered in isolation but in their context and with consideration to their cumulative effect. An act which may not appear comparable to the other acts enumerated in Article 5 might reach the required level of gravity if it had, or was likely to have, an effect similar to that of the other acts because of the context in which it was undertaken.”

Stakić, (Trial Chamber), July 31, 2003, para. 736 (same).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 48: “When invoking this test [of when acts not listed in the Statute reach the same level of gravity as the other crimes against humanity enumerated in Article 5], acts or omissions should not be considered in isolation but rather, in their context by looking at their cumulative effect. The *Krnjelac* Trial Chamber went on to state that, jointly or severally, ‘the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.’”

**(d) the acts underlying persecution, separately or combined,
must constitute a denial of, or infringement upon, a
fundamental right under international customary law**

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 323, 325: “The Appeals Chamber recalls incidentally that acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law. . . . The Appeals Chamber has no doubt that, in the context in which they were committed and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 103: “[I]t must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary international law or in international treaty law at the time the accused is alleged to have committed the offence. As stated above, these acts must constitute a denial of or infringement upon a fundamental right laid down in international customary or treaty law; not every act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 139 (same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 995: “Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying

act be regarded as a violation of international law.” *See also Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 48 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 160: “The Appeals Chamber considers that a Trial Chamber, when making a determination on a charge of persecutions, is obliged to assess whether the underlying acts amount to persecutions as a crime against humanity in international customary law.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 48: “This test [of when acts not listed in the Statute reach the same level of gravity as the other crimes against humanity enumerated in Article 5] will only be met by gross or blatant denials of fundamental human rights.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 621: “The Trial Chamber . . . defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.” (underlining omitted)

But see Stakić, (Trial Chamber), July 31, 2003, para. 773: “This Trial Chamber opines that it is immaterial to identify which rights may amount to fundamental rights for the purpose of persecution. Persecution can consist of the deprivation of a wide variety of rights, whether fundamental or not, derogable or not.”

**(e) acts may encompass physical or mental harm or
infringements upon individual freedom, as well as acts
which appear less serious**

Brđjanin, (Trial Chamber), September 1, 2004, para. 994: “The persecutory act or omission may encompass physical and mental harm, as well as infringements upon fundamental rights and freedoms of individuals.” *See also Vasićević*, (Trial Chamber), November 29, 2002, para. 246 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 433 (similar).

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 50: “The persecutory act(s) or omission(s) may encompass physical and mental harm, infringements upon individual freedom, as well as acts which appear less serious, such as those targeting property, provided that the victimised persons were specially selected or discriminated on political, racial, or religious grounds.”

(f) act is discriminatory where victim targeted because of group membership

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 583: “An act is discriminatory when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial or religious basis.”

(g) targeted individuals may include those defined by the perpetrator as belonging to the victim group due to their close affiliations to, or sympathies for, the victim group

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 49: “In relation to the targeted group’s possession of the religious, racial or political characteristics required for the crime of persecution, the Trial Chamber refers to the *Naletilic* Trial Judgement:

... the targeted group does not only comprise persons who *personally* carry the (religious, racial, or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group.*”

(emphasis in original)

Stakic, (Trial Chamber), July 31, 2003, para. 734: “The targeted individuals may include persons ‘who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group,*’ ‘as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status.’” (emphasis in original)

(h) each of the three grounds listed in Article 5(h) sufficient

Stakic, (Trial Chamber), July 31, 2003, para. 732: “Each of the three grounds listed in Article 5(h) of the Statute is in itself sufficient to qualify conduct as persecutions, notwithstanding the conjunctive ‘and’ in the text of Article 5(h).”

(i) actual discrimination must result

Vasiljevic (Appeals Chamber), February 25, 2004, para. 113: “Although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates *in fact* and is carried out deliberately with the intention to discriminate on one of the listed grounds.” (emphasis added) *See also Krmojelac*, (Appeals Chamber), September 17, 2003, para. 185 (discussing “the requirement for discrimination in fact (or a discriminatory act) established by the case-law”); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 993 (requiring “discrimination in fact”).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 583: “The act or omission needs to discriminate in fact, *i.e.*, a discriminatory intent is not sufficient, but the act or omission must have discriminatory consequences.”

Stakic, (Trial Chamber), July 31, 2003, para. 733: “The Trial Chamber recognises that ‘the persecutory act must be *intended* to cause, *and result in*, an infringement on an individual’s enjoyment of a basic or fundamental right.’ Although the Statute does not explicitly require that the discrimination take place against a member of a targeted group, the act or omission must in fact have discriminatory consequences rather than have been committed only with discriminatory intent.”

Compare Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 105: “With respect to the question as to whether a particular result of [an attack launched deliberately against civilians or civilian objects] is required, the Appeals Chamber recalls that acts may constitute a crime of persecutions if they are of gravity equal to the other crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts. Therefore, the Appeals Chamber finds that [an] unlawful attack launched deliberately against civilians or civilian objects may constitute a crime of persecutions without the requirement of a particular result caused by the attack(s).”

(i) application—actual discrimination against the detainees in the Omarska camp and the non-Serb population of Prijedor

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 362, 363: “Radic submits that the Trial Chamber erred in concluding that a criminal act can be discriminatory if the perpetrator acts with discriminatory intent only. In his view, there must be discriminatory consequences to hold an act discriminatory.” “The Trial Chamber found that all the detainees in the Omarska camp were non-Serbs or persons suspected of sympathizing with non-Serbs. Virtually all offences were committed against non-Serbs. The establishment of the camp formed only one element of a common plan to drive the non-Serb population of Prijedor out of the territory. Radic does not challenge these findings, nor does he dispute that the crimes committed in the Omarska camp, for which he was convicted under this count, deny or infringe fundamental rights of the victims. In the present case, the Appeals Chamber found that the Trial Chamber correctly defined the crime of persecution. Under the given circumstances, there is no doubt that the underlying crimes were committed upon discriminatory grounds, and had discriminatory effects.”

(j) mistaken target of persecution is still persecution

Krnjelac, (Appeals Chamber), September 17, 2003, para. 185: “[T]he Appeals Chamber does not agree with the interpretation given to this definition [of persecution] in . . . the [*Krnjelac* Trial] Judgment . . . which reads as follows:

The crime of persecution, the only crime in the Statute which must be committed on discriminatory grounds (see *Tadić* Appeal Judgment, par 305), has as its object the protection of members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups. If a Serb deliberately murders someone on the basis that he is Muslim, it is clear that the object of the crime of persecution in that instance is to provide protection from such discriminatory acts to members of the Muslim religious group. If it turns out that the victim is not Muslim, to argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance (Muslims).

The Appeals Chamber finds this assertion to be incorrect. It is an erroneous interpretation of the requirement for discrimination in fact (or a discriminatory act) established by the case-law. To use the example provided in the footnote, the Appeals Chamber considers that a Serb mistaken for a Muslim may still be the victim of the crime of persecution. The Appeals Chamber considers that the act committed against him institutes discrimination in fact, *vis-à-vis* the other Serbs who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.”

Brđanin, (Trial Chamber), September 1, 2004, para. 993: “With respect to the discriminatory element of the *actus reus*, although Tribunal jurisprudence is clear that the act must have discriminatory consequences, the Appeals Chamber has stated that it is not necessary that the victim of the crime of persecution be a member of the group against whom the perpetrator of the crime intended to discriminate. In the event that the victim does not belong to the targeted ethnic group, ‘the act committed against him institutes discrimination in fact, *vis-à-vis* other [members of that different group] who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.’”²⁴

²⁴ The position taken by the Appeals Chamber in *Krnjelac*, which is echoed by the Trial Chamber in *Brđanin* appears somewhat illogical. The Trial Chamber view in *Krnjelac* would appear the more cogent. The difference between the Trial Court and Appeals Court in *Krnjelac* is the difference in judgment regarding whether discrimination *in fact* occurred. Persecution as a crime against humanity requires both discrimination in fact (see “actual discrimination must result,” Section (IV)(d)(viii)(2)(i), ICTY Digest) and a discriminatory intent (see “discriminatory intent required for persecution,” Section (IV)(d)(viii)(4)(a), ICTY Digest). The Trial Court

(k) single act may constitute persecution if discriminatory intent proven

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 102: “The Appeals Chamber considers that:

although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.”

See also Blaskić, (Appeals Chamber), July 29, 2004, para. 135 (same); *Vasićević*, (Appeals Chamber), February 25, 2004, para. 113 (same); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 582 (quoting same).

Brđjanin, (Trial Chamber), September 1, 2004, para. 994: “Although persecution usually refers to a series of acts, a single act may be sufficient.” *See also Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 50 (same); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 433 (same).

Kupreskić et al., (Trial Chamber), January 14, 2000, para. 624: “[P]ersecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent.”

(i) application—single act may constitute persecution: murder at the Drina River, in the municipality of Visegrad in south-eastern Bosnia-Herzegovina

Vasićević, (Appeals Chamber), February 25, 2004, paras. 112-113: “[T]he Appellant submits that the Trial Chamber made an error of law ‘by convicting the accused for persecution solely on the basis of one incident which occurred on June 7, 1992 at the Drina River.’” “The Appeals Chamber does not subscribe to the views of the Appellant that the Trial Chamber erred in finding him guilty of persecution ‘solely on the basis of one incident[.]’ First, the Drina River incident consists of the murder of five people and the inhumane acts inflicted on two others. This incident cannot be described as a single act but rather as a series of acts. Second, as held by the Appeals Chamber in the *Krnjelac* Appeals Judgment, persecution is ‘an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international

suggests that the target of the discrimination must be the same for the discriminatory effect and the discriminatory intent. The Appeals Court divides the two elements and suggests that the existence of a discriminatory effect and a discriminatory intent is sufficient for persecution, despite different target groups, resulting in the bizarre construction that Serbs were actually discriminated against for not being mistaken for Muslims.

customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).’ Although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds.”

(I) prosecution must charge particular acts or omissions amounting to persecution

Blaskic, (Appeals Chamber), July 29, 2004, para. 139: “The Appeals Chamber notes that the Prosecution is required to charge particular acts as persecutions.”

Prosecutor v. Kipreskic et al., Case No. IT-95-16-A (Appeals Chamber), October 23, 2001, para. 98: “[T]he fact that the offence of persecution is a so-called ‘umbrella’ crime does not mean that an indictment need not specifically plead the material aspects of the Prosecution case with the same detail as other crimes. Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars. This does not mean, however, as correctly noted in the jurisprudence of this Tribunal, that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statute, is to particularize the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused’s role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.” See also *Stakic*, (Trial Chamber), July 31, 2003, paras. 771-772 (quoting same).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 581: “While the crime of persecutions is considered to be an ‘umbrella’ crime, the Appeals Chamber has warned that ‘[p]ersecution cannot, because of its nebulous character, be used as a catch-all charge.’ The Prosecution must plead particular acts or omissions which it alleges amount to persecutions in the Indictment.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 994: “The act or omission constituting the crime of persecution may assume different forms. However, the principle of legality requires that the Prosecution must charge particular acts amounting to persecution rather than persecution in general.” See also *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 50 (similar); *Knojevac*, (Trial Chamber), March 15, 2002, para. 453 (same as *Brdjanin*).

Stakic, (Trial Chamber), July 31, 2003, para. 735: “In charging persecutions, the

Prosecutor must plead with precision the particular acts amounting to persecutions.”

(3) examples of persecution

(a) destruction of property or means of subsistence

(i) prohibition of pillage is customary international law

Blaskic, (Appeals Chamber), July 29, 2004, paras. 147, 148: “Acts of plunder, which have been deemed by the International Tribunal to include pillage, infringe various norms of international humanitarian law. Pillage is explicitly prohibited in Article 33 of Geneva Convention IV, and Article 4, para. 2(g), of Additional Protocol II. In addition, Articles 28 and 47 of the Hague Regulations of 1907 expressly forbid pillage.”

“The prohibition against pillage may therefore be considered to be part of customary international law. In addition, it may be noted that the Nuremberg Charter and Control Council Law No. 10 prohibited the war crime of ‘plunder of public and private property,’ and the crime of pillage was the subject of criminal proceedings before the International Military Tribunal at Nuremberg and other trials following the Second World War, where in certain cases, it was charged both as a war crime and a crime against humanity. There may be some doubt, however, as to whether acts of plunder, in and of themselves, may rise to the level of gravity required for crimes against humanity.”

(ii) destruction of property, depending on the nature and extent of the destruction, may be of equal gravity to other crimes listed in Article 5

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 108, 109: “The Appeals Chamber finds that the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the Statute.” “It has to be noted that the crime of pillage was the subject of criminal proceedings before the International Military Tribunal at Nuremberg and other trials following the Second World War, where in certain cases, it was charged both as a war crime and a crime against humanity. The Appeals Chamber has to consider whether an act of plunder, committed separately or cumulatively, with discriminatory intent *in concreto* amounts to persecutions being of an equal gravity as the other crimes against humanity listed in Article 5 of the Statute.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 149: “The Appeals Chamber finds that the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the Statute.” *See also Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 594 (similar).

(iii)examine severity of impact

Blaskic, (Appeals Chamber), July 29, 2004, para. 146: “The destruction of property has been considered by various Trial Chambers of the International Tribunal to constitute persecutions as a crime against humanity. The Trial Chamber in *Kupreskic* considered that whether such attacks on property constitute persecutions may depend on the type of property involved, and that ‘certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone’s car (unless the car constitutes an indispensable and vital asset to the owner).’ The *Kupreskic* Trial Chamber held, however, that in the circumstances of that case, which concerned the comprehensive destruction of homes and property, this constituted ‘a destruction of the livelihood of a certain population,’ and may have the ‘same inhumane consequences as a forced transfer or deportation.’ The Trial Chamber concluded that the act ‘may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.’ The Appeals Chamber agrees with this assessment.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 594 (similar); *Kupreskic*, (Trial Chamber), January 14, 2000, para. 631 (same language as quoted).

(iv) various acts covered, including plunder and looting that render a people homeless and with no means of economic support

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 102-103: “The jurisprudence of the Tribunal, as well as previous war crimes jurisprudence has established that the acts of plundering if carried out with the requisite discriminatory intent may form the basis of the crime of persecution. As held in *Blaskic* Trial Judgement, in the context of persecution, plunder will involve unlawful, extensive and wanton appropriation of private or ‘quasi-state’ public property belonging to a particular population. The *Kordic* Trial Chamber held:

[I]n the context of an overall campaign of persecution, rendering a people homeless and with no means of economic support may be the method used to coerce, intimidate, terrorise and forcibly transfer civilians from their homes and villages. Thus when the cumulative effect of . . . [these acts] is the removal of civilians from their homes on discriminatory grounds, the ‘wanton and extensive destruction or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock’ may constitute the crime of persecution.”

“The Trial Chamber finds no reason to disagree with the above jurisprudence and accepts that the acts of plundering and looting, as defined above, may constitute persecution.”

Stakić, (Trial Chamber), July 31, 2003, paras. 763-764: “The Trial Chamber notes that prior jurisprudence has held that ‘[i]n the context of an overall campaign of persecution, rendering a people homeless and with no means of economic support may be the method used to “coerce, intimidate, terrorise [...] civilians [...]”’ When the cumulative effect of such property destruction is the removal of civilians from their homes on discriminatory grounds, the ‘wanton and extensive destruction and /or plundering of Bosnian Muslim civilian dwellings, buildings, business, and civilian personal property and livestock’ may constitute the crime of persecution.”

“This Trial Chamber therefore concludes that acts of ‘destruction, wilful damage and looting of residential and commercial properties,’ even if not listed in Article 5 of the Statute, may amount to persecution.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 205: “Prior jurisprudence of the International Tribunal has made clear that the destruction of property with the requisite discriminatory intent may constitute persecution.” “[W]hen the cumulative effect of such property destruction is the removal of civilians from their homes on discriminatory grounds, the ‘wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock’ may constitute the crime of persecution.”

Blaskić, (Trial Chamber), March 3, 2000, paras. 227, 233, 234: “[P]ersecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind. [P]ersecution may . . . take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina.”

“[T]he crime of ‘persecution’ encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.”

“In the context of the crime of persecution, the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily. In the same context the plunder of property is defined as the unlawful, extensive and wanton appropriation of property belonging to a particular population, whether it be the property of private individuals or of state or ‘quasi-state’ public collectives”

(v) institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science

Deronjić, (Trial Chamber), March 30, 2004, para. 122: “The destruction of an institution dedicated to religion is not listed under Article 5 of the Statute, but it was held in *Stakić* that ‘the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science,’ a crime punishable under Article 3 (d) of the Statute, when perpetrated with the requisite discriminatory intent, amounts to Persecutions.”

Stakić, (Trial Chamber), July 31, 2003, paras. 765-768: “Article 3(d) of the Statute penalises ‘the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’ as violations of the laws or customs of war.” “The International Military Tribunal, and the 1991 I.L.C Report, *inter alia*, have singled out the destruction of religious buildings as a clear case of persecution as a crime against humanity.” “This Trial Chamber shares the view that [t]his act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people.” “The Trial Chamber therefore concludes that acts of ‘destruction of, or wilful damage to, religious and cultural buildings,’ even if not listed in Article 5 of the Statute, may amount to persecutions.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, paras. 206-207: The following “acts may constitute the crime of persecution provided they are performed with the requisite discriminatory intent:” destruction and damage of religious or educational institutions. “The Trial Chamber . . . finds that the destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution.”

(vi) application—equal gravity

Brdjanin, (Trial Chamber), September 1, 2004, para. 1023: “The Trial Chamber is satisfied that the destruction, wilful damage and looting of residential and commercial properties in the parts of towns, villages and other areas [in Bosnia and Herzegovina] inhabited predominantly by a Bosnian Muslim and Bosnian Croat population and destruction of, or wilful damage to, Bosnian Muslim and Bosnian Croat religious and cultural buildings in the instant case occupy the same level of gravity as the other crimes enumerated in Article 5 of the Statute.”

Deronjić, (Trial Chamber), March 30, 2004, paras. 123-124: “Although the wanton destruction of property is not a crime listed under Article 5 of the Statute, it was held in *Stakić* that [w]hen the cumulative effect of such property destruction is removal of

civilians from their homes on discriminatory grounds, the “wanton and extensive destruction [...] of Bosnian Muslim civilian dwellings, buildings, business, and civilian personal property and livestock” may constitute the crime of persecution.”²⁵ “The Trial Chamber finds . . . that the aforementioned acts [including killing, forcible displacement, attacks on a village and destruction of an institution dedicated to religion [committed in Glogova, in eastern Bosnia] fulfil the legal requirements of Article 5 (h) of the Statute, i.e. are of an equal gravity as the other crimes listed under Article 5 of the Statute.”

(vii) application—destruction of property generally

(a) Autonomous Region of Krajina

Brđanin, (Trial Chamber), September 1, 2004, paras. 1022, 1024: “Earlier in this judgement, the Trial Chamber established the extensive destruction and appropriation of non-Serb property [in the Autonomous Region of Krajina] located in areas predominantly inhabited by Bosnian Muslims and Bosnian Croats during the period relevant to the Indictment. The Trial Chamber also found that Muslim and Roman Catholic institutions dedicated to religion were targeted and suffered severe damage during the summer months of 1992. Unlike non-Serb property, Bosnian Serb property was systematically left intact and only sporadically damaged. The Trial Chamber, therefore, finds that the destruction and appropriation of non-Serb property and religious buildings was discriminatory in fact.”

“With regard to the requisite *mens rea*, the Trial Chamber finds that the circumstances surrounding the commission of the acts of destruction and appropriation of property and the destruction or damage to religious buildings, such as the marking of Bosnian Muslim and Bosnian Croat houses to be destroyed and the destruction and subsequent flattening of non-Serb religious sites and their subsequent use as parking lots, are indicative that the acts were carried out with the intent to discriminate on racial, religious or political grounds.”²⁶

(b) Srebrenica

Obrenovic, (Trial Chamber), December 10, 2003, para. 37: Where the accused pled guilty to persecution as a crime against humanity, the Trial Court recognized: “Beginning around 12 July 1995 and continuing throughout the period of the executions, the personal property of the Bosnian Muslim prisoners [from Srebrenica], including their identification documents, was confiscated and destroyed by members of the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] and the MUP [Ministry of the Interior] in the Zvornik area.”

²⁵ For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

Nikolic – Momir, (Trial Chamber), December 2, 2003, para. 39: “Beginning around 12 July 1995 and continuing throughout the period of executions [subsequent to the fall of Srebrenica], the personal property of Bosnian Muslim men was confiscated and destroyed by members of the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] and MUP [Ministry of the Interior]. This included identification documents and valuables. As the Bosnian Muslim refugees travelled along the Bratunac-Milici road, personal property was taken and destroyed. Additionally, at various execution sites, Bosnian Muslim men had any property still in their possession confiscated, and subsequently destroyed.” See also *Nikolic – Momir*, (Trial Chamber), December 2, 2003, paras. 21, 31 (the destruction of personal property and effects belonging to the Bosnian Muslims was part of the crime of persecution to which Nikolic pled guilty).

Compare Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 615, 620: “It has been established that the Bosnian Muslim men who were taken to the ‘White House’ [in Potocari] had to leave their personal belongings including their wallets and identification papers outside the building and that all those belongings were subsequently burned. The Trial Chamber further recalls evidence as to a pile of burning personal belongings on the football field near Nova Kasaba where hundreds of Bosnian Muslim men had been detained. The Trial Chamber finds that the destruction of those personal belongings was not justified by military necessity.”²⁶ “However, in relation to the destruction of the personal belongings such as clothes and wallets, the Trial Chamber does not find that those personal belongings constituted indispensable assets to their owners. The Trial Chamber therefore does not find that the burning of those personal belongings had a severe enough impact on the victims to reach the threshold of equal gravity as the acts listed in Article 5 of the Statute.”

(c) Bosanski Samac

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 873-874, 1027: “The Trial Chamber accepts that immediately after the forcible takeover of Bosanski Samac individual looting on a large scale occurred. Cars, money, and jewellery were plundered from civilians. Furniture, kitchen appliances, and personal belongings were removed from private houses and apartments. Commercial property and farm equipment belonging to civilians in Bosanski Samac and the neighbouring villages was looted.

²⁶ Note that the crime of “devastation not justified by military necessity” under Article 3(b), and the crime of extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly under Article 2(d), both require the destruction not be justified by military necessity. See Sections (ii)(d)(viii) and (i)(d)(iv), respectively, ICTY Digest.

Sometimes property was taken by force or by threat of use of force. Property exclusively belonging to non-Serbs was targeted. It has been established that paramilitaries, individual members of the 4th Detachment, policemen, and ordinary Serb civilians, were involved in acts of plundering of non-Serb property.”

“While there is extensive evidence of the occurrence of unlawful appropriation of property, the Trial Chamber is not satisfied that the role of the Crisis Staff in these acts has been proved beyond reasonable doubt.”

“The Trial Chamber is not satisfied that the widespread plundering and looting of the property of Bosnian Muslims and Croats was part of the common plan to persecute non-Serb civilians. While the Accused’s knowledge of the occurrence of acts of looting is not contested in this case, the Trial Chamber is not satisfied that the Accused’s intentional participation in any form has been proved beyond reasonable doubt.”

(d) Prijedor municipality

Stakić, (Trial Chamber), July 31, 2003, paras. 809-810: “The Trial Chamber has already found that many residential and commercial properties were looted and destroyed in the parts of towns, villages and other areas in Prijedor municipality inhabited predominantly by Bosnian Muslims and Bosnian Croats.” “The Trial Chamber is convinced that these acts amount to crimes against humanity [as persecution].”

Stakić, (Trial Chamber), July 31, 2003, paras. 811-813: “The Trial Chamber has already found that Bosnian Muslim and Bosnian Croat religious buildings were destroyed or wilfully damaged in a number of villages whereas Serb Orthodox churches remained intact.” “The Catholic Church in Prijedor, for example, was blown up on 28 August 1992 by a group of soldiers and police.” “The Trial Chamber is satisfied that these acts amount to crimes against humanity, committed by the direct perpetrators with the discriminatory purpose to destroy such non-Serb religious buildings.”

For discussion of the crime of “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” under Article 2(d), see Section (I)(d)(iv), ICTY Digest. For discussion of “devastation not justified by military necessity” under Article 3(b), see Section (II)(d)(viii), ICTY Digest. See also discussion of the crime of “plunder” under Article 3(e), see Section (II)(d)(ix), ICTY Digest.

(b) unlawful arrest

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, paras. 60, 62: “Unlawful arrest has not been defined in the jurisprudence of the Tribunal. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (‘Body of Principles’), defines an arrest as ‘the act of apprehending a person for the alleged

commission of an offence or by the action of an authority.’ International Conventions enshrine the right to be free from arbitrary arrest and imprisonment. Article 5 of the European Convention of Human Rights provides for the right to liberty and security and that no one shall be deprived thereof except in particular cases detailed in that Convention and in accordance with a procedure prescribed by law. Article 9 of the International Covenant on Civil and Political Rights provides that everyone has the right to liberty and security of the person and no one shall be subjected to arbitrary arrest or detention, except in accordance with procedures established by law. The Trial Chamber considers, therefore, that the act of unlawful arrest means to apprehend a person, without due process of law.”

“The Trial Chamber is of the opinion that while unlawful arrest may in itself not constitute a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, when considered in context, together with unlawful detention or confinement, such acts may constitute the crime of persecution as a crime against humanity.”

(i) application—unlawful arrest: Bosanski Samac

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 654, 656, 657: “The Trial Chamber is satisfied that following the takeover in Bosanski Samac Municipality on 17 April 1992, and continuing throughout 1992, large-scale arrests of Bosnian Muslims and Bosnian Croats were carried out in the Municipality.” “The majority of persons arrested were non-Serb civilians in Bosanski Samac, namely Bosnian Muslims and Bosnian Croats. One category of persons arrested, who were civilians, were the women, children, and elderly who were taken from their homes and brought to Zasavica.” “The Trial Chamber concludes that the arrests of groups of women, children and elderly, who were subsequently detained in Zasavica and Crkvina were arbitrary, with no lawful basis. They were arrested because they were non-Serbs, not because there was a reasonable suspicion that they had committed any offences, or for reasons of their safety.”

(c) unlawful detention

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 59: “[T]he *Blaskić* Trial Chamber has considered unlawful detention as a form of the crime of persecution, defining unlawful detention as ‘unlawfully depriving a group of discriminated civilians of their freedom.’ The *Kupreskić* Trial Chamber also held that the organised detention of civilians may constitute persecution. Unlawful confinement of civilians is a grave breach of the Geneva Conventions of 1949 found in Article 2(g) of the Statute, and the crime of imprisonment is listed as a crime against humanity in Article 5(e) of the Statute.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 61: “[U]nlawful detention, confinement and imprisonment have each been considered acts of persecution and constituting crimes against humanity”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 66: “The Trial Chamber considers that the elements of the offence of unlawful detention are the same as those for unlawful confinement and imprisonment as set out in the *Krnjelac* Judgement It has noted that the Body of Principles refers to the terms detention and imprisonment interchangeably, and defines detention and imprisonment as the condition of detained or imprisoned persons, which is further described as ‘any person deprived of personal liberty except as a result of conviction for an offence.’” See *Krnjelac*, (Trial Chamber), March 15, 2002, para. 115.

Blaskic, (Trial Chamber), March 3, 2000, para. 234: “The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom.”

For discussion of the crime of imprisonment under Article 5(e) of the Statute, see Section (IV)(d)(v), ICTY Digest.

(i) application—unlawful detention

(a) Lasva River Valley region in central Bosnia

Blaskic, (Appeals Chamber), July 29, 2004, para. 155: “The Appeals Chamber considers that the acts charged in the Indictment which encompass *the detention of Bosnian Muslim civilians* who were killed, used as human shields, beaten, subjected to physical or psychological abuse and intimidation, inhumane treatment, and deprived of adequate food and water [in the Lasva River Valley region in central Bosnia], all rise to the level of gravity of the other crimes enumerated in Article 5.” (emphasis added).

(b) Bosanski Samac, north-eastern Bosnia and Herzegovina

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 684-685: “The Trial Chamber finds that the Bosnian Croat, Bosnian Muslims and other non-Serbs detained in the detention facilities above, namely at the [Secretariat of the Interior], [Territorial Defence], primary and secondary schools, Brcko, and Bijeljina [in Bosanski Samac, in north-eastern Bosnia and Herzegovina], were deprived of their liberty arbitrarily. The evidence has clearly established that there was no legal basis which could be relied upon to justify their deprivation of liberty under national or international law. The small group of members of the SDA [Party of Democratic Action] paramilitary unit, which the Trial Chamber accepted may have been arrested upon a reasonable suspicion of committing a crime, were not subject to fair or lawful criminal proceedings to justify their detention. Others who were detained were not under suspicion of having ever

committed a crime, and again, were not subjected to fair and lawful proceedings to justify their continued detention.”

“The Trial Chamber is satisfied that non-Serb persons were arrested and detained because of their non-Serb ethnicity and political affiliations. The overwhelming majority of those detained were Bosnian Croats and Bosnian Muslims civilians. The Trial Chamber finds that the arrest and detention of the non-Serb civilian population in Bosanski Samac was carried out on a discriminatory basis, as the Bosnian Muslim and Bosnian Croat population was targeted specifically, while their Serb neighbours were on the whole left unharmed. In addition, members of the SDA and [Croatian Democratic Union], Bosnian Muslim and Croat political parties were arrested and detained, while again, members of the Serb parties were not.”

**(c) Ahmici, located in the municipality of
Vitez in the Lasva River Valley in central
Bosnia and Herzegovina**

Kupreskie, (Trial Chamber), January 14, 2000, para. 629: “[T]he Trial Chamber finds that the ‘deliberate and systematic killing of Bosnian Muslim civilians’ [in Ahmici] as well as their ‘organised detention and expulsion from Ahmici’ can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.”

(d) unlawful confinement

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 63: “Unlawful confinement has been considered by the Tribunal to constitute persecution and a crime against humanity. The Trial Chamber in *Kordić* held that the elements of the crime of unlawful confinement under Article 2 of the Statute, and the elements of the crime of imprisonment under Article 5 of the Statute are identical. The Trial Chamber in the *Krnjelac* Judgement shared this view, but also considered that as a crime against humanity, the definition of imprisonment was not restricted by the grave breaches provisions of the Geneva Conventions.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 65: “[T]he Trial Chamber adopts the elements of the crime of imprisonment under Article 5(e) of the Statute, as set out in the *Krnjelac* Trial Judgement, and applies this test to the charge of unlawful detention and confinement in the Amended Indictment.”

See Krnjelac, (Trial Chamber), March 15, 2002, para. 115: “To establish the crime of imprisonment as a crime against humanity under Article 5(e) of the Tribunal’s Statute, the Trial Chamber accordingly finds that the following elements must be established in the circumstances of the present case:

1. An individual is deprived of his or her liberty.

2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.”

(i) application—unlawful confinement: Municipalities of Bosanski Samac and Odzak

See Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 684-685 (finding that Bosnian Croats, Bosnian Muslims, and other non-Serbs detained at the SUP (Secretariat of the Interior), TO (Territorial Defense), primary and secondary schools, Brcko, and Bijeljina detention facilities [in the Municipalities of Bosanski Samac and Odzak] were arbitrarily deprived of their liberty).

For discussion of the crime of imprisonment under Article 5(c) of the Statute, see Section (IV)(d)(v), ICTY Digest. See also “unlawful deportation or transfer or unlawful confinement of a civilian” under Article 2, Section (I)(d)(vii), ICTY Digest.

(e) deportation, forcible transfer and forcible displacement

(i) are crimes of equal gravity to other crimes listed in Article 5

Blaskić, (Appeals Chamber), July 29, 2004, paras. 152-153: “The Appeals Chamber in the *Krnjelac* case held that:

Forcible displacements, taken separately or cumulatively, can constitute a crime of persecution of equal gravity to other crimes listed in Article 5 of the Statute. [...]

The Appeals Chamber concludes that displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute.”

“In light of the foregoing analysis and jurisprudence, the Appeals Chamber considers that at the time relevant to the Indictment in this case, deportation, forcible transfer, and forcible displacement constituted crimes of equal gravity to other crimes listed in Article 5 of the Statute and therefore could amount to persecutions as a crime against humanity.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 151 (discussing deportation and forcible transfer under the Geneva Conventions).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 602: “The Trial Chamber finds that forcible transfer, taken separately or cumulatively, and when committed on discriminatory grounds it is of equal gravity to other crimes listed in Article 5 of the Statute and therefore it may constitute persecutions.”

Brjanin, (Trial Chamber), September 1, 2004, para. 1025: “The Prosecution charges ‘the deportation or transfer of Bosnian Muslims and Bosnian Croats [...] from areas within the [Autonomous Region of Krajina] municipalities [...] to areas under the control of the legitimate government of Bosnia and Herzegovina (Travnik) and Croatia (Karlovac)’ as persecutions. These acts are separately charged as deportation (a crime against humanity under Article 5(d) of the Statute) and as inhumane acts (forcible transfer) (a crime against humanity under Article 5(i) of the Statute) and as such are by definition of sufficient gravity to constitute persecution.”

See also Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 121: “While Article 5(d) of the Statute prohibits ‘deportation,’ forcible transfer is not explicitly mentioned in Article 5(d) and (h) of the Statute. Thus, forcible transfer can only constitute a persecutory act if it amounts to a ‘gross and blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5’ of the Statute.”

**(ii) displacements punishable under customary
international law**

Krnjelac, (Appeals Chamber), September 17, 2003, para. 223: “[T]he Appeals Chamber holds that at the time of the conflict in the former Yugoslavia, displacements both within a state and across a national border were crimes under customary international law.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 595: “It is well established that displacements within a state or across national borders, for reasons not permitted under international law, are crimes punishable under customary international law.”

**(iii)deportation, forcible transfer and forcible displacement
defined**

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 595: “The crime of forcible transfer has been defined in the jurisprudence of this Tribunal as the forced displacement of individuals from the area in which they are lawfully present without grounds permitted under international law. Traditionally, the distinction between forcible transfer and deportation is that the first one consists of forced displacements of

individuals within state borders, while the second one consists of forced displacement beyond internationally recognised state borders.”

Brđanin, (Trial Chamber), September 1, 2004, para. 540: “Traditionally, the distinction between the *actus reus* of ‘deportation’ and ‘forcible transfer’ is identified with the destination to which individuals are displaced. The Trial Chamber notes that the majority of trial judgements from this Tribunal that have addressed the issue have held that under customary international law, ‘deportation’ consists of the forced displacement of individuals *beyond* internationally recognised state borders. In contrast, ‘forcible transfer’ may consist of forced displacement *within* state borders.” (emphasis in original)

Blaskić, (Trial Chamber), March 3, 2000, para. 234: “The deportation or forcible transfer of civilians [as a form of the crime of persecution] means ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’”

See also “transfer over *de facto* boundaries that are not internationally recognized, such as constantly changing frontlines,” Section (IV)(d)(iv)(3), ICTY Digest.

For the holding that the failure to distinguish persecution by way of deportation and expulsion from expulsion or forcible transfer was not reversible error where there was no ambiguity that the indictment covered displacements both within and outside the borders of Bosnia and Herzegovina, see *Krnjelac*, (Appeals Chamber), September 17, 2003, paras. 214-215.

For discussion of when deportation and imprisonment should be classified as crimes under Article 5 (d) and (e) of the Statute, respectively, or as persecution under Article 5(h), see *Krnjelac*, (Appeals Chamber), Separate Opinion of Judge Schomburg, September 17, 2003, paras. 4, 11.

**(a) forcible displacement not limited to
displacements across a national border**

Krnjelac, (Appeals Chamber), September 17, 2003, para. 218: “The Appeals Chamber holds that acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border. The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.”

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 221-222: “On several occasions, the Tribunal’s Trial Chambers have found that the forced displacement of the population within a state or across its borders constituted persecution.” “The Appeals Chamber concludes that displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute.”

(b) error of law not to examine whether forcible displacement constituted a crime under customary international law at the time committed

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 223-224: “[T]he Appeals Chamber holds that at the time of the conflict in the former Yugoslavia, displacements both within a state and across a national border were crimes under customary international law. Consequently, the principle *nullum crimen sine lege* has been respected.” “The Appeals Chamber finds that by failing to establish whether the alleged acts of forcible displacement constituted persecution, the Trial Chamber committed an error of law which invalidates its decision.”

(vi) elements

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 124: “[T]he following common elements need to be ascertained for a finding that an act of deportation or forcible transfer has occurred: (i) the unlawful character of the displacement; (ii) the area where the person displaced lawfully resided and the destination to which the person was displaced; and [(iii)] the intent of the perpetrator to deport or forcibly transfer the victim.”

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 123: “From the jurisprudence of the Tribunal it is clear that the elements of the offences of deportation and forcible transfer are substantially similar. As noted by the Trial Chamber in *Krtic*, ‘any forced displacement is by definition a traumatic experience which involves abandoning one’s home, losing property and being displaced under duress to another location.’ Accordingly, the Trial Chamber is satisfied that deportation and forcible transfer share the same substantial elements, apart from deportation requiring that a national border must be crossed.”

(vii) assessing voluntariness of displacement

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 596: “It is the ‘forced character of displacement and the forced uprooting of the inhabitants of a territory’ that give rise to criminal responsibility. The requirement of ‘forcible’ describes a situation

where individuals do not have a free or ‘genuine’ choice to remain in the territory where they were present. The element of ‘forcible’ has been interpreted to include threats or the use of force, fear of violence, and illegal detention. It is essential therefore that the displacement takes place under coercion. Even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice. The trier of fact must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims’ vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 126, 128: “The Trial Chamber is of the view that in assessing whether the displacement of a person was voluntary or not, it should look beyond formalities to all the circumstances surrounding the person’s displacement, to ascertain that person’s genuine intention. For instance, in situations where persons are relocated following detention in one or several places, coupled with various forms of mistreatment, an expression of consent does not necessarily reflect a person’s genuine desire to leave, as the person may not be faced with a real choice. Whether a person would have wished to leave the area absent circumstances of discrimination or persecution may also be considered as indicative of a person’s wish. A lack of genuine choice may be inferred from, *inter alia*, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes ‘calculated to terrify the population and make them flee the area with no hope of return.’” “[W]hat matters is the *personal* consent or wish of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons.” (emphasis in original)

(viii) application—lack of possibility of genuine consent

(a) KP Dom Prison Complex in Foca, located in Bosnia and Herzegovina

Krnjelac, (Appeals Chamber), September 17, 2003, para. 233: “The Trial Chamber finds that living conditions in the KP Dom [prison complex in Foca] made the non-Serb detainees subject to a coercive prison regime which was such that they were not in a position to exercise genuine choice. This leads the Appeals Chamber to conclude that the 35 detainees were under duress and that the Trial Chamber erred in finding that they had freely chosen to be exchanged.”

Krnjelac, (Appeals Chamber), Separate Opinion of Judge Shahabuddeen, September 17, 2003, paras. 9-10: “The circumstances of this case have been recalled in . . . the judgment of the Appeals Chamber There were many vacant cells in KP Dom [prison complex]; yet the non-Serb detainees were heaped into crowded cells, each of which was designed to accommodate one prisoner in solitary confinement but which now held up to 18 detainees, without the possibility of lying down and with little hygiene. There was no provision for warmth even during a severe winter, and detainees were forbidden to make any necessary extra clothing. They were given bare survival food; they lost weight, between 20 and 40 kilos per detainee. They were generally required to stay in their cells, sometimes placed in isolation for small infractions. There were frequent beatings; the cries and moans of those being beaten could be heard. There was torture. Fresh bloodstains were visible. Detainees knew that colleagues were taken out never to return – that they were made to ‘disappear.’ There was evidence that detainees had been killed on the premises; surviving detainees knew this. The atmosphere was one of violence and fear; the climate was oppressive; detainees were vulnerable; the situation was inhuman.”

“In such circumstances, it is difficult to appreciate what more the prosecution could be asked to show in discharge of its burden to prove that there was no possibility of genuine consent to work or to be relocated. The fact that some detainees were eager for the opportunity to go out of KP Dom to work or to be relocated has been dealt with in the judgment. That does not show that there was a possibility of genuine consent; on the contrary, it is only evidence of the consequence of the absence of any possibility of genuine consent.”

(b) Srebrenica

See Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 617-618 (discussing lack of ability to genuinely consent whether to remain in or leave Srebrenica).

(ix) location to which victim is displaced must be sufficiently distant

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, para. 130: “[T]he Trial Chamber notes that among the legal values protected by deportation and forcible transfer are the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location. Therefore, the Trial Chamber finds that the location to which the victim is forcibly displaced is sufficiently distant if the victim is prevented from effectively exercising these rights.”

**(x) evacuation is permissible to ensure the security
of the population or for imperative military
reasons**

Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 597, 598: “[F]orced displacement of individuals is a crime when it is not carried out for one of the grounds recognised under international law. Both Article 49(2) of the Fourth Geneva Convention and Article 17(1) of Additional Protocol II, which have been cited above, contain provisions providing for exceptions, namely, when ‘the security of the civilians involved or imperative military reasons so demand.’ The term used to describe the displacement in such exceptional situations is ‘evacuation.’ Evacuation is by definition a temporary and provisional measure and the law requires that individuals who have been evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. From this it may be concluded that it is unlawful to use evacuation measures as a pretext to remove the population and effectuate control over a desired territory. It should be recalled here that, while evacuation is undertaken in the interests of the civilian population, it is by definition an extreme measure for those displaced.”

“The exceptions when evacuations may be carried out are somewhat overlapping. Evacuation to ensure the security of the population is authorised when the area in which the population is located is in danger as a result of ‘military operations’ or ‘intense bombing.’ In such situations, in the interest of the protection of the civilian population a military commander may, and is in fact duty bound to, evacuate the population. This situation is similar to that when evacuations for ‘imperative military reasons’ may be carried out, *i.e.* when the presence of the population hampers military operations. There is an important distinction, however, in that evacuations in this latter situation may only be carried out when necessitated by overriding, *i.e.* imperative, military reasons. In considering whether these exceptions justify proven acts of forcible population displacements, the trier of fact will consider whether there was in actual fact a military or other significant threat to the physical security of the population, and whether the military operation in question was ‘imperative.’”

**(xi) evacuation is permissible for humanitarian
reasons**

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 600: “In light of the particular factual situation in the present case, the Trial Chamber has considered whether the law also provides for an exception to the general prohibition against forcible displacements that would permit evacuations for humanitarian reasons. It finds that it does. The Trial Chamber reiterates the general obligation of all parties to a conflict to protect and respect the civilian population as well as other protected persons. The Trial Chamber has already found that Article 17 of Additional Protocol II is applicable in this case. Article 17 provides in part that “[t]he displacement of the civilian population shall

not be ordered for reasons related to the conflict.’ The Commentary to this provision indicates that for other reasons – such as the outbreak or risk of outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening living situation – forcible displacement of the civilian population may be lawfully carried out by parties to the conflict. Such displacement must, however, comply with the requirements of evacuation, including among others, that they be of a temporary character.”

(xii) obligations incumbent upon the evacuating party

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 599: “If an evacuation is carried out, it is incumbent upon the evacuating party to ensure that the civilian population, to the extent possible and practicable, is properly provided for in terms of accommodation, hygiene, health, safety and nutrition. With regard to international armed conflicts, the Fourth Geneva Convention provides that the evacuating party shall ensure that members of the same family are not separated to the greatest practicable extent. While Article 17 of Additional Protocol II does not contain the same provision, this Trial Chamber does not find any reason why this general principle should not be applicable also to non-international armed conflicts.”

(xiii) *mens rea*

Krnjelac, (Appeals Chamber), Separate Opinion of Judge Schomburg, September 17, 2003, para. 16: “The *mens rea* for deportation is the intent to remove the victim, which implies the intention that the victim can or will not return.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 601: “As for the *mens rea*, the perpetrator must intent [*sic*] to remove the victims, which implies the intention that they should not return. By definition, therefore, lawful evacuations, under any of the three recognised exceptions, cannot form part of this crime. The fact that no step is taken by the perpetrator to secure the return of those displaced, when the circumstances that necessitated the evacuation have ceased, is among the factors that may prove an intent to permanently displace the victims rather than the intent to secure the population through a lawful – and therefore temporary – evacuation.”

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, paras. 134, 974: “[T]he Trial Chamber accepts that a finding of forced displacement, either as deportation or forcible transfer, requires an element of permanency in relation to the intention of the accused. An important consideration in this context will be the intended goal of the relocation.” “[T]he Trial Chamber finds that relocations of non-Serb prisoners from one detention centre to another within Serb-held territory in Bosnia and Herzegovina do not constitute forcible transfer unless the Accused had the intent that the victims did not return.”

For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

(xiv) subsequent voluntary return does not impact on criminal responsibility

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 601: “The Trial Chamber finds that the fact that victims subsequently return to the area by their own volition does not have an impact on the criminal responsibility.”

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, para. 134: “[T]he Trial Chamber finds that whether persons forcibly displaced were able to return to their former place of residence at a later time has no bearing on the assessment of the legality of the original displacement; thus, the duration of the displacement has no impact on its illegality. Otherwise, the perpetrator who had the intent to permanently displace the victim would unjustifiably benefit from such return.”

(xv) application—deportation, forcible transfer and forcible displacement

(a) from Foca municipality

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 236-238: “The Trial Chamber reached the following conclusion:

The expulsion, exchange or deportation of non-Serbs, both detainees at the KP Dom [prison complex in Foca] and those who had not been detained, was the final stage of the Serb attack upon the non-Serb civilian population in Foca municipality. Initially there was a military order preventing citizens from leaving Foca. However, most of the non-Serb civilian population was eventually forced to leave Foca. In May 1992, buses were organized to take civilians out of town, and around 13 August 1992 the remaining Muslims in Foca, mostly women and children, were taken away to Rozaje, Montenegro. On 23 October 1992, a group of women and children from the municipality, having been detained for a month at Partizan Sports Hall, were deported by bus to Gorazde. [...] In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serbian region ethnically cleansed of Muslims. By the end of the war in 1995, Foca had become an almost purely Serb town.”

“Given these conclusions, as well as the discriminatory character of unlawful detention and the imposition of the living conditions described above on non-Serb KP Dom [prison complex] detainees, the Appeals Chamber considers that it was not reasonable for the Trial Chamber to conclude that there was no evidence that the 35 detainees had been transferred to Montenegro on the requisite discriminatory grounds.”

“The Appeals Chamber holds that the reasoning with regard to the forcible displacement of the 35 non-Serb detainees to Montenegro is applicable *mutatis mutandis* to other displacements recognised by the Trial Chamber. The same holds for Krnojelac’s discriminatory intent.” See also *Krnojelac*, (Appeals Chamber), September 17, 2003, para. 233 (discussing lack of genuine consent regarding exchanges).

(b) from Srebrenica

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 616-618: “It is established that the Bosnian Muslim population was forcibly displaced from the Srebrenica enclave through Potocari, including the women, children and elderly who were transported to Kladanj, and the Bosnian Muslim men who were bussed out of Potocari to temporary detention facilities in Bratunac.”

“The evidence establishes that the Bosnian Muslim refugees in Potocari did not have a genuine choice of whether to remain in or leave the Srebrenica enclave. This lack of a genuine choice was a result of the actions and behaviour of the officers and soldiers of the [Army of the Republika Srpska] towards the refugees. In particular the Trial Chamber observes the following evidence testimony:

- the widespread knowledge among the Bosnian Muslim refugees of serious crimes committed by members of the Bosnian Serb forces in Potocari,
- the organised, inhumane and frequently aggressive process of separating out and removing the male members of the population,
- the evidence regarding the conditions in Potocari during the nights of 11 and, in particular, 12 July,
- that many [Army of the Republika Srpska] soldiers were cursing at the Bosnian Muslim refugees, saying that they would be slaughtered, and
- the demonstrative attack by the [Army of the Republika Srpska] on Potocari in the morning of 12 July.”

“All these actions by members of the Bosnian Serb forces served to show the Bosnian Muslim refugees that they did not have a genuine choice to remain in the enclave. The transport of the Bosnian Muslim refugees out of the enclave was consequently forcible in character. Although documentary evidence indicates that the [Army of the Republika Srpska] used the term ‘evacuation’ to describe the forcible transfer, the Trial Chamber is unable to find that any of the exceptions to the general prohibition of forcible population displacements apply to the actions of the [Army of the Republika Srpska]. Moreover, the evidence is clear that the perpetrators did not intend that those displaced would be able to return once the situation had normalised in the area. The Trial Chamber therefore concludes that the elements of the crime of forcible transfer, as a component crime of persecution, have been met and that this crime was committed.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 40-42: “On the evening of 11 July 1995, Rarko Mladic and other VRS [Army of the Serbian Republic of Bosnia and

Herzegovina/Republika Srpska] officers held two meetings at the Hotel Fontana with members of the Dutch Battalion and, in the case of the second meeting, a representative of the Bosnian Muslim refugees who had fled from Srebrenica. Momir Nikolic was present at the Hotel Fontana during both meetings. During the second meeting, Mladic told the Bosnian Muslim representative that his people could either 'survive or disappear.' At a third meeting held at the Hotel Fontana on 12 July 1995 attended by members of the VRS, Bosnian Serb representatives, Dutch Battalion officers and representatives of the Bosnian Muslim refugees, Ratko Mladic 'explained that he would supervise the "evacuation" of refugees from Potocari and that he wanted to see all military-aged Bosnian Muslim men so that they could be screened as possible war criminals.' It was during these meetings that 'the plan to transport the civilian refugee population from Potocari was developed.'"

"Buses began arriving on 12 July 1995 in Potocari; Momir Nikolic was present at that time. The forcible transfer process of Bosnian Muslim women and children began. Bosnian Muslim men, however, were not permitted to board the buses; they were separated and transported to detention sites in Bratunac."

"In his Statement of Facts, Momir Nikolic states that '[d]uring the attack and takeover of the Srebrenica enclave by the VRS forces in July 1995 it was the intention of the VRS forces to cause the forcible removal of the entire Muslim population from Srebrenica to Muslim-held territory.' The statement continues: 'On 11 July 1995, VRS forces captured and occupied the town of Srebrenica causing the Muslim population to move to the Dutch UN base in Potocari.'"

**(c) from Banja Luka, Prijedor, Sanski Most
and Bosanski Novi in the Autonomous
Region of Krajina**

Brđanin, (Trial Chamber), September 1, 2004, paras. 1027-1028: "On the basis of the evidence adduced by the parties, the Trial Chamber earlier established that numerous acts of deportation and forcible transfer did take place in the period relevant to the Indictment, notably in the municipalities of Banja Luka, Prijedor, Sanski Most and Bosanski Novi. The individuals displaced as a result of these acts were almost exclusively Bosnian Muslims and Bosnian Croats. This policy was implemented through armed force, expulsion, intimidation, the imposition of intolerable living conditions, and the establishment of punitive departure conditions, all of which were targeted specifically at the Bosnian Muslim and Bosnian Croat communities. The Trial Chamber therefore finds that these acts of deportation and forcible transfer were discriminatory in fact."

"With respect to the requisite *mens rea*, the Trial Chamber finds that the circumstances surrounding the commission of the acts of deportation and forcible transfer are indicative that the acts were carried out by the direct perpetrators with the intent to discriminate. The displacements which occurred were the result of a systematic

policy on the part of the Bosnian Serb authorities to cleanse the municipalities [in the Autonomous Region of Krajina] of non-Serbs.”

**(d) from the Serbian Autonomous Region of
Krajina**

Prosecutor v. Babić, Case No. IT-03-72-S (Trial Chamber), June 29, 2004, paras. 14-16: “In the period of the Indictment, from about 1 August 1991 to 15 February 1992, Serb forces comprised of JNA [Yugoslav People’s Army] units, local Serb TO [Territorial Defence] units, TO units from Serbia and Montenegro, local MUP [Serbian Ministry of Internal Affairs] police units, MUP police units from Serbia, and paramilitary units attacked and took control of towns, villages, and settlements in the [Serbian Autonomous District of] Krajina.”

“After the take-over, in cooperation with the local Serb authorities, the Serb forces established a regime of persecutions designed to drive the Croat and other non-Serb civilian populations from these territories. The regime, which was based on political, racial, or religious grounds, included the extermination or murder of hundreds of Croat and other non-Serb civilians in Dubica, Cerovljani, Bacin, Saborsko, Poljanak, Lipovaca, and the neighbouring hamlets of Skabrnja, Nadin, and Bruska in Croatia; the prolonged and routine imprisonment and confinement of several hundred Croat and other non-Serb civilians in inhumane living conditions in the old hospital and the JNA barracks in Knin, which were used as detention facilities; the deportation or forcible transfer of thousands of Croat and other non-Serb civilians from the [Serbian Autonomous District of] Krajina; and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites of the Croat and other non-Serb populations in Dubica, Cerovljani, Bacin, Saborsko, Poljanak, Lipovaca, and the neighbouring hamlets of Vaganac, Skabrnja, Nadin, and Bruska.”

“These acts were intended to permanently and forcibly remove the majority of the Croat and other non-Serb populations from approximately one-third of Croatia in order to transform that territory into a Serb-dominated state. The acts started on or about 1 August 1991 and continued until June 1992, at least, that is until after the indictment period, which runs only until 15 February 1992.” As to Babić’s participation in the campaign of persecutions and his *mens rea*, as part of evaluating his guilty plea, see *Babić*, (Trial Chamber), June 29, 2004, paras. 24-28.

For discussion of deportation under Article 5(d), see Section (IV)(d)(iv), ICTY Digest. For discussion of forcible transfer as an “other inhumane act” under Article 5(f), see Section (IV)(d)(ix)(6)(a), ICTY Digest. For discussion of “unlawful deportation or transfer or unlawful confinement of a civilian” under Article 2, see (I)(d)(vii), ICTY Statute.

(f) harassment, humiliation, degradation, and psychological abuse

Kročka et al., (Appeals Chamber), February 28, 2005, para. 323: “Harassment, humiliation and psychological abuse are not listed as such under Article 5 of the Statute nor do they constitute specific offences under other articles of the Statute. The Appeals Chamber notes however that Common Article 3(1)(c) of the Geneva Conventions prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment.’ The specific offence of outrages upon personal dignity also appears in Article 75(2)(b) of Additional Protocol I. The Appeals Chamber also considers that acts of harassment and other psychological abuse, depending on the circumstances, can clearly be assimilated to violations of the ‘mental well-being of persons’ prohibited under Article 75(2)(a) of Additional Protocol I. The Appeals Chamber recalls incidentally that acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1014: “Humiliating and degrading treatment is prohibited under common Article 3 of the Geneva Conventions, although such acts are not explicitly listed under Article 5 or elsewhere in the Statute. In order to rise to the level of crimes against humanity, they must meet the test of gravity which satisfies the criteria for persecution.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 95: “The Trial Chamber [in *Kročka*] went on to examine harassment, humiliation and psychological abuse stating that ‘these acts are not explicitly listed under Article 5 nor do they appear as specific offences under other Articles of the Statute,’ and concluded that:

the horrendous conditions of detention and the demoralizing treatment of detainees in Omarska camp were sufficiently degrading and traumatizing to constitute per se an outrage upon personal dignity, which qualifies as persecution since it was clearly committed on discriminatory grounds.

In addition to the harassment, humiliation, and psychological trauma endured by the detainees as part of their daily life in the camp, psychological abuse was also inflicted upon them through having to see and hear torturous interrogations and random brutality perpetrated on fellow inmates. The Trial Chamber is satisfied that the harassment, humiliation, and psychological abuses fall under the *actus reus* of persecution.”

Stakić, (Trial Chamber), July 31, 2003, paras. 759-760: “When examining the allegations of ‘harassment, humiliation and psychological abuse’ and describing the conditions of detention prevailing in a camp, the Trial Chamber in the *Kročka et al.* case found that ‘humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly

constitute persecution.” “This Trial Chamber holds that the alleged acts of constant humiliation and/or degradation may amount to persecutions.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 190: “In order to constitute persecution, harassment, humiliation, and psychological abuse must occupy the same level of seriousness as other listed or recognized crimes against humanity, or together with other crimes cognizable under Article 5, they must form part of a course of conduct which satisfies the criteria for persecution.” “[H]umiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution.”

(i) application—harassment, humiliation, degradation and psychological abuse

(a) the Omarska Camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 324-325: “Contrary to Kvočka’s claim, the Trial Chamber endeavoured to show in what respect the acts of harassment, humiliation and psychological abuse committed in the [Omarska] camp reached the degree of gravity of the crimes against humanity explicitly listed in the Statute. The Trial Chamber argued as follows:

(...) The conditions of detention prevailing in the camp – gross overcrowding in small rooms without ventilation, requiring the detainees to beg for water, and forcing them to relieve bodily functions in their clothes – were themselves a form of abuse, and were intended to harass, humiliate, and inflict mental harm on the detainees. The constant berating, demoralizing, and threatening of detainees, including the guards’ coercive demands for money from detainees, and the housing of detainees in lice-infected and cramped facilities were calculated by participants in the operation of the camp to inflict psychological harm upon detainees. Just as rape and forced nudity are recognized as crimes against humanity or genocide if they form part of an attack directed against a civilian population or if used as an instrument of the genocide, humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution.

The Trial Chamber is also satisfied that the horrendous conditions of detention and the demoralizing treatment of detainees in Omarska camp were sufficiently degrading and traumatizing to constitute *per se* an outrage upon personal dignity, which qualifies as persecution since it was clearly committed on discriminatory grounds.”

“The Appeals Chamber has no doubt that, in the context in which they were committed [sic] and taking into account their cumulative effect, the acts of harassment,

humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution. The Appeals Chamber finds the conclusion reached by the Trial Chamber reasonable.”

**(b) camps and detention facilities in the
Autonomous Region of the Krajina**

Brdjanin, (Trial Chamber), September 1, 2004, paras. 1015-1020: “There are no specific incidents expressly charged as constant humiliation and degradation of Bosnian Muslims and Bosnian Croats in the Indictment. The Trial Chamber has already established the horrific conditions in which Bosnian Muslims and Bosnian Croats were forced to live in camps and other detention facilities [in the Autonomous Region of the Krajina], which were themselves humiliating and degrading. As part of the attack on human dignity, Bosnian Muslims and Bosnian Croats were constantly called by pejorative names while being forced to sing ‘Cetnik’ songs, show the three-fingered Serbian greeting and show devotion for Serbian national symbols. Such treatment was humiliating and degrading to all non-Serbs. Beatings inside and outside camps were ubiquitous and merciless.”

“There are many more examples of incidents in which the human dignity of Bosnian Muslims and Bosnian Croats was treated with outright contempt. The conditions in which people were transported to and from camps bear a resemblance to the transportation of livestock. In the camps and other places of detention, it was commonplace that detainees had no choice but to relieve themselves in the room in which they were detained.”

“During interrogations, detainees were made to adopt uncomfortable postures while being held at gunpoint. Once, a Bosnian Muslim was forced to drink whisky. A Bosnian Croat was made to eat the piece of paper on which he had written a statement because he had used Latin, not Cyrillic script.”

“As part of the ill-treatment by camp guards, Bosnian Muslims and Bosnian Croats were also forced to beat and perform sexual acts on each other. It was announced that their mothers and sisters would be raped in front of them. Bosnian Muslims and Bosnian Croats were forced to watch other members of their group being killed, raped, and beaten. Detainees were provided with totally inadequate food over long periods. On one occasion, when some bread was thrown into their room, they started to fight over it like animals. People licked walls in order to get water from condensation. Some detainees started to hallucinate or became mentally disturbed as a result of the conditions.”

“As a final humiliating gesture, the bodies of killed Bosnian Muslims and Bosnian Croats were often treated with disrespect or even mutilated, buried in mass graves and sometimes re-buried in order to cover up the crimes committed. Some of these gravesites have not been discovered to date. There can be no doubt that these acts were discriminatory in fact. The Trial Chamber also finds that in the given situation, these acts amount to the level of gravity of crimes against humanity.”

“With regard to the requisite *mens rea*, taking into account the circumstances surrounding the commission of these acts of humiliation and degradation, the Trial Chamber has no doubt at all that the direct perpetrators possessed the requisite discriminatory intent based on racial, religious and political grounds.”²⁷

(c) the Omarska, Keraterm and Trnopolje camps

Stakić, (Trial Chamber), July 31, 2003, paras. 807-808: “The Trial Chamber is satisfied beyond reasonable doubt that thousands of non-Serbs detained in the Omarska, Keraterm and Trnopolje camps were constantly subjected to acts of humiliation and degradation. Apart from the already established terrible conditions in which the detainees were forced to live in the camps, which were themselves humiliating and degrading, several Muslim and Croat witnesses testified that, during their detention, on different occasions, they were forced to show Serbian signs (three fingers) and sing ‘Chetnik’ songs. These songs were abusing and humiliating to all non-Serb people. In addition, they were cursed, insulted and called ‘ustasa,’ ‘balija’ or ‘Green Berets.’ A witness testified that in the Prijedor SUP [Secretariat of the Interior] Building prisoners were regularly threatened and insulted.”

“The Trial Chamber is satisfied that these acts were committed by the direct perpetrators with the intent to inflict humiliating and degrading treatment upon the victims. The Trial Chamber is also convinced that these acts amount to crimes against humanity [as a form of persecution].”

(g) murder

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 106: “With respect to the charges of wilful killing, murder, causing serious injury, and inhuman treatment, the Appeals Chamber considers that the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment is recognised in customary international law and is embodied in Articles 6 and 7 of the ICCPR [International Covenant on Civil and Political Rights], and Articles 2 and 3 of the ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms]. It is clear in the jurisprudence of the International Tribunal that acts of wilful killing, murder, and of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecutions. As concluded by *inter alia* the *Kupreskić et al.* Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include ‘murder,

²⁷ For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 143 (same).

Blaskić, (Appeals Chamber), July 29, 2004, para. 143: “With respect to the charges of killing and causing serious injury, the Trial Chamber stated that ‘there is no doubt that serious bodily and mental harm [...] may be characterised as persecution when [...] they target the members of a group because they belong to a specific community.’”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 585: “Murder is set out as a crime against humanity pursuant to Article 5(a) of the Statute and, as such, can therefore amount to persecutions.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 999: “Because the elements of acts of wilful killings are identical to those required for murder under Article 5 of the Statute, they are as such of sufficient gravity to constitute persecution.”

Đerongjić, (Trial Chamber), March 30, 2004, para. 119: “Although the term ‘killing’ as such is not mentioned in the list of crimes punishable under Article 5 of the Statute, it is used interchangeably with the term ‘murder,’ which is a crime punishable pursuant to Article 5 (a) of the Statute.”

Kupreskić et al., (Trial Chamber), January 14, 2000, para. 615: “In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.”

(i) application—murder

(a) Srebrenica

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 604: “[T]he Trial Chamber finds that during the days following the fall of Srebrenica thousands of Bosnian Muslim men were murdered. The Trial Chamber further finds that amongst the killed there were also elderly and children. It also recalls the stabbing to death of a baby by [Army of the Republika Srpska] soldiers when they were told that it was a boy. The Trial Chamber also finds that babies were killed intentionally by not satisfying their essential needs. The Trial Chamber further finds that women were killed and recalls evidence as to dead female bodies that were found in a stream near the UN compound in Potocari.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 620 (finding that murder, *inter alia*, amounted to the crime of persecution).

Obradović, (Trial Chamber), December 10, 2003, para. 30: Where the accused pled guilty to persecution as a crime against humanity, the Trial Court recognized: “Within

approximately one week in mid-July 1995, approximately 6,000 Bosnian men who had escaped in 'the column' from Srebrenica were captured, detained and executed in various locations in the Bratunac and Zvornik municipalities. Along the route between Bratunac and Zvornik, the names previously used to mark settlements and communities or places of learning, culture and work or for geographic features are now used to identify mass execution sites: Jadar River, Cerska Valley, Petkovci School, Pilica Cultural Centre, and the villages of Tisca and Orahovac. At one location, Branjevo Military Farm, approximately 1,200 Bosnian Muslim men who had been captured from the column were executed by automatic weapon fire. Over 1,000 prisoners were executed at the Kravica warehouse on 13 July 1995. . . ."

(b) Autonomous Region of Krajina

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1000-1001: "Earlier in this Judgement, the Trial Chamber defined the legal requirements for the crime of killings and established that at least 1669 Bosnian Muslims and Bosnian Croats were killed in the [Autonomous Region of Krajina] at the time relevant to the Indictment. The Trial Chamber finds that these killings were discriminatory in fact."

"With respect to the requisite *mens rea*, the Trial Chamber observes that the use of pejorative names such as 'Balijs' for Muslims, 'Ustasas' for Croats and other verbal abuse often accompanied the killings. The Bosnian Serb direct perpetrators frequently celebrated their deeds by singing 'Cetnik' songs. On occasion, Bosnian Muslims were deprived of their lives because they were believed to be members or supporters of the SDA [Party for Democratic Action]. Before they were killed, Bosnian Muslims and Bosnian Croats were hit with or forced to kiss Serbian religious and national symbols, and made to sing Serbian songs. In contrast, a detainee who claimed to have a Serbian mother was spared execution. The Trial Chamber concludes that the circumstances surrounding the killings of Bosnian Muslims and Bosnian Croats substantiate the finding of discriminatory intent on racial, religious or political grounds on the part of the direct perpetrators."²⁸

(c) Municipality of Prijedor

For findings that killings of the non-Serb population in the Municipality of Prijedor constitute murder underlying the charge of persecution, see *Stakić*, (Trial Chamber), July 31, 2003, paras. 775-779.

(h) torture

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 106: "As concluded by *inter alia* the Kupreskić *et al.* Trial Chamber, the crime of persecutions has developed in

²⁸ For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

customary international law to encompass acts that include ‘murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.’”

Brdjanin, (Trial Chamber), September 1, 2004, para. 1002: “Torture . . . [under] Article 5(f) of the Statute . . . is of sufficient gravity to constitute persecution.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 79: “Torture is contained in Article 5(f) of the Statute, and as such, is of sufficient gravity to constitute an underlying offence of persecution.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 600: “It is clear that the courts understood persecution to include severe attacks on the person such as murder, extermination and torture; acts which potentially constitute crimes against humanity under the other subheadings of Article 5.”

(i) application—torture

(a) camps and detention facilities in the Autonomous Region of Krajina

Brdjanin, (Trial Chamber), September 1, 2004, paras. 1003-1004: “The Trial Chamber has . . . found that in many instances, Bosnian Muslims and Bosnian Croats were subjected to severe ill-treatment and abuse amounting to torture. The Trial Chamber finds that these acts of torture were discriminatory in fact.”

“With regard to the requisite *mens rea*, the Trial Chamber recalls that in camps and detention facilities, Bosnian Muslims and Bosnian Croats were commonly beaten up severely by their Bosnian Serb guards, as well as by Bosnian Serbs admitted from outside into the places of detention. Before and during these acts, detainees were frequently cursed, insulted, and called by derogatory names referring to their ethnicity. When Bosnian Muslims refused to kiss the Serbian flag or the four Serbian S’s, they were stabbed or beaten until they fell unconscious. In many instances, severe pain or suffering was inflicted on Bosnian Muslims because they were allegedly supporting an independent Bosnian state or the SDA [Party for Democratic Action]. Serbian songs were chanted very frequently during this ill-treatment and at times the victims themselves were forced to sing them. The Trial Chamber concludes that the circumstances surrounding the commission of acts of torture leave no doubt that they

were carried out with the intention to discriminate against the victims on racial, religious or political grounds.”²⁹

**(b) detention facilities in Bosanski Samac,
Crkvina, Brcko, Bijeljina**

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 772: “The Trial Chamber is further satisfied that the other heinous acts that witnesses testified about, including sexual assaults, the extraction of teeth, and the threat of execution, constitute torture. These acts caused severe physical and mental pain and suffering and occurred in order to discriminate on ethnic grounds against the victims.”

**(c) the Omarska, Keraterm and Trnopolje
camps and elsewhere**

Stakić, (Trial Chamber), July 31, 2003, paras. 780-785: “The Trial Chamber has already found that many of the detainees at the Omarska, Keraterm and Trnopolje camps were subjected to serious mistreatment and abuse amounting to torture. Detainees were severely beaten, often with weapons such as cables, batons and chains. In Omarska and Keraterm, this occurred on a daily basis. As a result of these brutal beatings detainees were seriously injured. The Trial Chamber is convinced that severe beatings were also committed in the Miska Glava community centre, the Ljubija football stadium, the SUP [Secretariat of the Interior] building, and outside the camps.”

“These examples of serious mistreatment lead the Trial Chamber to the following conclusions. First, all the mistreatment was of such a serious nature that it amounted to the infliction of severe pain or suffering. Second, the examples provided show that the direct perpetrators had the intent to inflict such pain or suffering for one of the purposes set out in the definition of torture. Some examples demonstrate that the direct perpetrator intended to obtain information from the victim. Other examples indicate that the direct perpetrator inflicted the pain or suffering with a discriminatory intent towards the victim.”

See also torture under Article 5(f) of the Statute, as a crime against humanity (*i.e.*, not as an underlying crime of persecution), Section (IV)(d)(vi), ICTY Digest.

²⁹ For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

(i) cruel and inhumane treatment

(i) defined

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 586: “Cruel and inhumane treatment is defined as an intentional act or omission, which causes serious mental harm, physical suffering or injury, or which constitutes a serious attack on human dignity.”

(ii) elements

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 74: “In assessing the content of cruel and inhumane treatment [as a form of persecution], the Trial Chamber finds that it is assisted by the Tribunal’s jurisprudence regarding other inhumane acts under Article 5 (i) of the Statute, inhuman treatment under Article 2 (b) of the Statute, and cruel treatment under Article 3 of the Statute. The elements of these offences are the same, namely:

- (a) an intentional act or omission of similar gravity to the other enumerated acts under the Article concerned;
- (b) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
- (c) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.”

(iii) customary international law

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 587: “The Appeals Chamber has found that, *inter alia*, the right to be free from cruel, inhuman or degrading treatment is recognised in customary international law and is enshrined in international human rights instruments.”

(iv) acts of serious bodily and mental harm are of sufficient gravity compared to the other crimes enumerated in Article 5

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 587: “The Appeals Chamber has further found that ‘[i]t is clear in the jurisprudence of the International Tribunal that acts of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecutions.’”

(a) application—gravity

Blaskic, (Appeals Chamber), July 29, 2004, para. 155: “The Appeals Chamber considers that the acts charged in the Indictment which encompass the detention of Bosnian Muslim civilians who were killed, used as human shields, beaten, subjected to physical or psychological abuse and intimidation, inhumane treatment, and deprived of adequate

food and water, all rise to the level of gravity of the other crimes enumerated in Article 5.”

(v) determining seriousness/severity of the harm suffered

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 586: “The seriousness of the harm or injury must be assessed on a case by case basis, taking into consideration various factors including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, its physical and mental effects on the victim and, in some instances, the personal circumstances of the victim, including age, gender and health. The harm inflicted does not need to be permanent and irremediable; it must, however, have more than a short-term or temporary effect on the victim.”

Simic, Tadic, and Zoric, (Trial Chamber), October 17, 2003, para. 75: “Consideration must be given to all the factual circumstances in the determination of the seriousness of the act, including the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim, including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. While there is no requirement that the suffering imposed by the act has long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.”

(vi) cruel and inhumane treatment is a lesser included offense of torture

Simic, Tadic and Zoric, (Trial Chamber), October 17, 2003, para. 71: “The Trial Chamber notes that the words ‘cruel and inhumane treatment’ appear to be superfluous with regard to torture, as it is well-established that torture may in itself constitute a persecutory act pursuant to Article 5 (h) of the Statute. It is also generally accepted that cruel and inhumane treatment is a lesser included offense of torture, and that the latter is considered *lex specialis* in relation to cruel and inhumane treatment.”

(vii) beatings as a form of cruel and inhumane treatment

Simic, Tadic, and Zoric, (Trial Chamber), October 17, 2003, paras. 77-78, 83: “The Trial Chamber emphasises that the mere description of bodily assaults as ‘beatings’ does not by itself establish that these beatings constitute the *actus reus* of cruel and inhumane treatment as persecutory acts. Instead, the beatings have to amount to a ‘gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.”

“Taking into consideration the requirements of Article 5(i) of the Statute as set out above, the Trial Chamber finds that beatings constitute cruel and inhumane treatment if the following elements can be proved:

(a) the beatings caused serious mental or physical suffering or injury or constituted a serious attack on human dignity, and

(b) the beatings were performed deliberately.”

“The Trial Chamber notes that beatings committed on discriminatory grounds and causing severe pain or suffering, physical or mental, constitute cruel and inhumane treatment as an underlying act of persecution. The deliberate infliction of severe physical or mental pain or suffering through beatings in order to discriminate [sic] a victim constitutes torture [but was not pled as such].”

(viii) forced labor as a form of cruel and inhumane treatment

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 91-92: “The Trial Chamber notes that certain types of forced labour may amount to cruel and inhumane treatment if the conditions under which the labour is rendered are such as to create danger for the life or health of the civilians, or may arouse in them feelings of fear, and humiliation. It should be noted here that the principle of humane treatment enshrined in the Geneva Conventions implies an obligation for the occupying powers to protect civilians against inhumane acts. Forcing protected persons to work in life-threatening circumstances fails to meet the obligation for protection against acts of violence and may result in inflicting upon these persons physical and mental suffering. It has been held that placing detainees in life-threatening situations constitutes cruel and inhuman treatment.”

“It is important to emphasize that inhumane treatment encompasses not only acts or omissions that cause serious mental or physical suffering, but also acts or omissions that constitute a serious attack on human dignity. Among the provisions prohibiting humiliating and degrading treatment, Article 52, paragraph 2 of Geneva Convention III explicitly proscribes compelling prisoners of war to do humiliating labour. The Commentary to Geneva Convention III notes that the prohibition is against making the prisoner ‘the laughing stock of those around him.’ An inquiry into the specific circumstances in each case will be necessary in order to determine whether the conditions under which civilians were forced to work constituted a serious attack on human dignity.”

(ix) confinement under inhumane conditions as a form of cruel and inhumane treatment

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 94, 96, 97: “When discussing ‘confinement under inhumane conditions,’ the *Kvočka* Trial Chamber found that:

Confinement in camps under inhumane conditions can be included under sub-clauses (e) and (i) prohibiting ‘imprisonment’ and ‘other inhumane acts’ and also meets the definition of a persecutory act.”

“The *Krnjelac* Trial Chamber further observed:

The establishment and perpetuation of inhumane conditions is separately charged as inhumane acts, a crime against humanity pursuant to Article 5(f) of the Statute, and as cruel treatment, a violation of the law or customs of war pursuant to Article 3 of the Statute, and as such is of sufficient gravity to constitute persecution.”

“The Trial Chamber finds that harassment, humiliation, the creation of an atmosphere of fear through torture and other forms of physical and psychological abuse, an insufficient supply of food and water, lack of space, unhygienic detention conditions, and an insufficient access to medical care are circumstances that may constitute confinement under inhumane conditions and meet the *actus reus* of cruel and inhumane treatment as a persecutory act.”

(x) *mens rea*

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 74: The *mens rea* of cruel and inhumane treatment is: “the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 76: “The *Vasiljevic* Trial Chamber held that the *mens rea* for inhumane acts is met ‘where the offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.’ The Trial Chamber accepts this definition.”

See also “other inhumane acts” under Article 5(f) of the Statute, Section (IV)(d)(ix), ICTY Digest; “cruel treatment” under Article 3 of the Statute, Section (II)(d)(iii), ICTY Digest; and “inhuman treatment” under Article 2(b) of the Statute, Section (I)(d)(ii)(2), ICTY Digest.

(xi) application—cruel and inhumane treatment

(a) following the fall of Srebrenica

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 605-610: “The Prosecution has charged ‘the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potocari and in detention facilities in Bratunac and Zvornik’ as a persecutory act.”

“It has been established that the Bosnian Muslim refugees who were forced to flee to Potocari were exposed to horrific and inhumane conditions and found

themselves, as described by a [Dutch Battalion of UNPROFOR] member, in a 'hopeless [...] and extremely uncertain and unsecure' situation. The 20,000 to 30,000 people, who were very exhausted, had very limited access to water despite the heat, almost no food and were exposed to a lack of basic medical treatment and toilet facilities. In addition, the refugees were exposed to insults and physical abuse aimed at creating an atmosphere of intimidation and panic that increased during the night of 12 July – 'the night of horror' – when the refugees suffered from extreme fear as the soldiers moved among the refugees, shouting and firing their weapons, and taking people away. The Trial Chamber finds that the continued exposure to such intimidating and life threatening conditions caused serious mental and physical suffering among the refugees."

"The Trial Chamber also finds that there is sufficient evidence to establish beyond reasonable doubt that the brutal separation of the men from the women and children throughout the Potocari area on 12 and 13 July amounts to cruel and inhumane treatment. The Trial Chamber finds that the refugees who experienced the pulling apart of their families – who were aggressively separated and taken away from their beloved ones without knowing if they would ever see them again – suffered serious mental harm. As one example of an extremely aggressive separation that also caused serious bodily harm, the Trial Chamber recalls the evidence that a young boy was grabbed by the throat and 'more or less strangled' when a [Army of the Republika Srpska] soldier tried to pull him away from his family."

"The Trial Chamber also finds that there is sufficient evidence to establish beyond reasonable doubt that the Bosnian Muslim men who were taken by [Army of the Republika Srpska] soldiers from the UN compound to the 'White House' suffered serious mental and bodily harm. . . ."

"The Trial Chamber further finds that there is sufficient evidence to establish beyond reasonable doubt that the Bosnian Muslim men who were detained on buses in Bratunac or in other detention facilities in Bratunac and Zvornik were subjected to horrific conditions and mistreatment. The Trial Chamber recalls that the buses and detention centres were packed with men who were suffering from the heat and were not provided with sufficient, if any, water or food. The prisoners were prevented from relieving themselves; they were badly beaten; and repeatedly men were singled out for further abuse and often were finally killed while the remaining men had to witness their moaning in pain and the shots. The Trial Chamber finds that the Bosnian Muslim men who experienced these atrocities and the uncertainty of their fate, were suffering serious mental and bodily harm."

"The Trial Chamber conclusively finds that there is sufficient evidence to establish beyond reasonable doubt that the terrible mistreatment as summarily described above caused serious mental harm and physical suffering and was a continuous attack on the human dignity of the Bosnian Muslims subjected to the mistreatment."

Obrenovic, (Trial Chamber), December 10, 2003, para. 35: Where the accused pled guilty

to persecution as a crime against humanity, the Trial Court recognized the following as to cruel and inhuman treatment of Bosnian Muslim civilians: “The Bosnian Muslim civilians were subjected to acts of violence, including beatings at schools and other detention centres in the Zvornik area. In Luke, near Tisca, some of the women who had been separated from their male relatives in Potocari were ‘selected’ by VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] soldiers to go to a school, on 13 July 1995 where they were abused and assaulted; men and boys were also selected and abused before being taken for execution.”

Nikolic – Momir, (Trial Chamber), December 2, 2003, paras. 36-37: Under the heading “Cruel and Inhumane Treatment of Bosnian Muslim Civilians,” the Trial Chamber stated: “Following the fall of the Srebrenica enclave, Bosnian Muslim civilians were subjected to acts of violence, including severe beatings at Potocari. In Potocari, men were separated from women and children and detained. Furthermore, Bosnian Muslim men who were detained in Bratunac and Zvornik were subjected to cruel and inhumane treatment.” “In his Statement of Facts, Momir Nikolic confirms that during the time that Bosnian Muslims were detained in Potocari and around Bratunac, they were not given any food or medical aid, and were only given enough water to sustain them until they were transported to Zvornik.”

**(b) beatings at detention facilities in
Bosanski Samac and in Crkvina, Brcko,
and Bijeljina**

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 770-771: “The Trial Chamber is convinced that on 17 April 1992 and in the following months, a large number of non-Serb civilians were repeatedly beaten in the detention facilities in Bosanski Samac and in Crkvina, Brcko, and Bijeljina. Some of the victims had already been beaten upon their arrest. During their imprisonment in the detention facilities, detainees were severely beaten with various objects, such as rifles, metal bars, baseball bats, metal chains, police batons, and chair legs. The detainees were beaten on all parts of their bodies, and many of them suffered serious injuries. Some prisoners were beaten while undergoing interrogation. The beatings were applied by paramilitary forces from Serbia, local policemen, and a few members of the [Yugoslavia Peoples’ Army]. The beatings took place on a daily basis, day and night. The Defence for all three accused did not contest that such beatings occurred as described by the witnesses.”

“The Trial Chamber is satisfied that these beatings caused severe pain and suffering, both physically and mentally, to the detainees. The Trial Chamber is also satisfied that the beatings were committed on discriminatory grounds. The evidence shows that practically all detainees who were beaten were non-Serbs. On one occasion, a victim was beaten in the crotch, and his assailants told him that Muslims should not propagate. Prisoners were regularly insulted on the basis of their ethnicity. For these

reasons, the Trial Chamber finds that the beatings that were committed on discriminatory grounds constitute cruel and inhumane treatment as an underlying act of persecution.”

(c) confinement under inhumane conditions at detention centers in Bosanski Samac, Crkvina and Bijeljina

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, paras. 773, 775: “The Trial Chamber is . . . satisfied that the detainees who were imprisoned in the detention centres in Bosanski Samac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of ‘Chetnik’ songs and the verbal abuse of being called ‘ustasha’ or ‘balija’ were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity. The Trial Chamber finds that this confinement under inhumane conditions constitutes cruel and inhumane treatment [as a form of persecution]. This was done because of the non-Serb ethnicity of the detainees.”

“The Trial Chamber is satisfied that during detention in the detention centres in Crkvina and Bijeljina, the prisoners did not have sufficient space and sufficient food and water supply. They were kept in unhygienic conditions and did not have access to sufficient medical care. Furthermore, detainees were subjected to beatings that constituted cruel and inhumane treatment and torture. For these reasons, the Trial Chamber finds that these prisoners were also confined under inhumane conditions that constituted cruel and inhumane treatment [as a form of persecution].”

(d) forced labor—digging trenches, building bunkers, carry sandbags or railway sleepers for the construction of trenches, and building other fortifications on the frontline

Simic, Tadic, and Zaric, (Trial Chamber), paras. 834-835: “The Trial Chamber is satisfied that civilians who had to report every day in front of the Pensioner’s Home as well as civilians who were detained were forced to dig trenches, build bunkers, carry sandbags or railway sleepers for the construction of trenches, and build other fortifications on the frontline. It has been established that this work was not rendered voluntarily. Civilians were compelled to work under the supervision of armed guards, who beat, or fired at those who tried to escape. The Trial Chamber also accepts that the civilians who were forced to dig trenches, and to work on the frontline were not paid for their work.

The Trial Chamber is satisfied that civilians working on military assignments on the frontline were exposed to dangerous conditions and were under a high risk of being injured or killed. The Trial Chamber accepts that the acts of forcing civilians to work in life-threatening circumstances where they could be exposed to physical and mental suffering fail to meet the obligation for humane treatment of civilians enshrined in the Geneva Conventions and amount to cruel and inhumane treatment. The Trial Chamber is satisfied that these assignments were made on a discriminatory basis and that they reach the level of seriousness required for persecution.”

(e) confinement under inhumane conditions at the Omarska camp

For findings of confinement in inhumane conditions at the Omarska camp in Prijedor as a form of persecution, see *Kvočka et al.*, (Appeals Chamber), February 28, 2005, paras. 335-338.

(j) extermination

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 106: “As concluded by *inter alia* the *Kupreskić et al.* Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include ‘murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.”

Kupreskić et al. (Trial Chamber), January 14, 2000, para. 615: “In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.”

(k) serious bodily and mental harm/ physical violence

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 106: “With respect to the charges of wilful killing, murder, causing serious injury, and inhuman treatment, the Appeals Chamber considers that the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment is recognised in customary international law and is embodied in Articles 6 and 7 of the ICCPR [International Covenant on Civil and Political Rights], and Articles 2 and 3 of the ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms]. It is clear in the jurisprudence of the International Tribunal that acts of wilful killing, murder, and of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecutions.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1005: “The term ‘physical violence’ does not appear anywhere in the Statute. The Trial Chamber finds that ‘physical violence’ may comprise treatment that does not amount to torture as defined above,

such as ‘conditions in which detainees (are) forced to live, such as overcrowded conditions, deprivation of food, water and sufficient air, exposure to extreme heat or cold, random beatings of detainees as a general measure to instill terror amongst them and similar forms of physical assaults not amounting to torture . . .’³ Such treatment may fall under the crime of persecution if it reaches the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.”

Stakić, (Trial Chamber), July 31, 2003, paras. 752-753: “In the Trial Chamber’s view, ‘physical violence’ is a broad term which focuses *inter alia* on the conditions in which detainees were forced to live, such as overcrowded conditions, deprivation of food, water and sufficient air, exposure to extreme heat or cold, random beating of detainees as a general measure to instil terror amongst them and similar forms of physical assaults not amounting to torture as defined above.” “The Trial Chamber therefore holds that even if physical violence is not listed under Article 5 of the Statute and the alleged acts do not qualify as torture, they may nonetheless fall under the crime of persecution.”

(i) application—serious bodily and mental harm/ physical violence

(a) detention camps and facilities: the Manjaca Camp; the Mlavke football stadium and Bosanski Novi fire station in Bosanski Novi; the Kotor Varos Prison in Kotor Varos; the Omarska, Keraterm and Trnopolje camps in Prijedor; the Sloga shoe factory in Prnjavor; Betonirka in Sanski Most; and Pribinic and Territorial Defense buildings in Teslic

Brdjanin, (Trial Chamber), September 1, 2004, paras. 1006-1007: “The Trial Chamber recalls that conditions in the majority of camps and facilities in which Bosnian Muslims and Bosnian Croats were detained [including the Manjaca Camp set up on a mountain outside the city of Banja Luka; the Mlavke football stadium and Bosanski Novi fire station in Bosanski Novi; the Kotor Varos Prison in Kotor Varos; the Omarska, Keraterm and Trnopolje camps in Prijedor; the Sloga shoe factory in Prnjavor; Betonirka in Sanski Most; Pribinic and Territorial Defense buildings in Teslic] can only be characterised as absolutely appalling. Constant and random beatings were the order of the day. Detainees were beaten on the way to and during their daily meal, as well as when they asked to use toilet facilities. Sanitation and hygienic conditions were hideous. Detention facilities were intensely crowded. The Trial Chamber is thus satisfied that these incidents of physical violence were discriminatory in fact, and, placed in context,

occupy the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.”

“With respect to the requisite *mens rea*, the Trial Chamber observes that the circumstances surrounding the commission of acts of physical violence were the same as those in which torture was inflicted on detainees as described above. Consequently, the Trial Chamber concludes that the circumstances clearly show that they were carried out with the intention to discriminate against the Bosnian Muslims and Bosnian Croats concerned on racial, religious or political grounds.”³⁰

(b) the Omarska, Keraterm and Trnopolje camps

Stakić, (Trial Chamber), July 31, 2003, para. 790: “The Trial Chamber concludes that the perpetration of the inhumane conditions [at the Omarska, Keraterm and Trnopolje camps] constituting cruel and inhuman treatment of the non-Serb detainees was carried out by the direct perpetrators with the intent to cause serious physical suffering to the victims and to attack their human dignity. The direct perpetrators caused such physical suffering because the victims were non-Serbs. The Trial Chamber is satisfied that these acts of physical violence amount to crimes against humanity.”

(l) rape

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1008-1009: “Rape is set out as a crime against humanity under Article 5(g) of the Statute and as such is of sufficient gravity to constitute persecution. Under the jurisprudence of the Tribunal, it is defined as follows:

the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”

Citing Kunarac Trial Judgement, para. 460, *Kunarac* Appeal Judgement, paras. 127-128.

“It should be noted that the Appeals Chamber has held that force or threat of force provides clear evidence of non-consent, but is not an element *per se* of rape, since

³⁰ For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

‘a narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.’ The Trial Chamber agrees that ‘for a woman, rape is by far the ultimate offence.’”

Stakić, (Trial Chamber), July 31, 2003, paras. 755-756: “The Trial Chamber concurs with the definition of the crime of rape adopted by the *Kumarac et al.* Appeals Chamber.” “In this context, ‘[f]orce or threat of force provide clear evidence of non- consent, but force is not an element *per se* of rape. [...] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.’”

(i) application—rape

(a) municipalities of Prijedor, Teslic, Banja Luka, Bosanska Krupa, Donji Vakuf, and in Kotor Varos

Brdjanin, (Trial Chamber), September 1, 2004, paras. 1010, 1011: “Earlier in this judgement, the Trial Chamber established that a number of Bosnian Muslim women were raped in Prijedor and in Teslic municipalities. The Trial Chamber finds that, apart from these municipalities, rapes of Bosnian Muslim and Bosnian Croat women occurred in the municipalities of Banja Luka, Bosanska Krupa, Donji Vakuf, and in Kotor Varos. In each incident, armed Bosnian Serb soldiers or policemen were the perpetrators. There can be no doubt that these rapes were discriminatory in fact.”

“With regard to the requisite *mens rea*, the Trial Chamber notes that the direct perpetrators made abundant use of pejorative language. One of them made no secret that he wanted a Bosnian Muslim woman to ‘give birth to a little Serb.’ The Trial Chamber is satisfied beyond reasonable doubt that, in the circumstances surrounding the commission of these rapes, these acts were carried out with the intent to discriminate against the Bosnian Muslim and Bosnian Croat women on racial, religious or political grounds.”³¹

(b) the Trnopolje, Keraterm and Omarska camps

Stakić, (Trial Chamber), July 31, 2003, para. 806: “The Trial Chamber is . . . convinced that rape based on discriminatory intent was committed also in the Trnopolje camp.

³¹ For discussion of the *mens rea* required for persecution generally, see Section (IV)(d)(viii)(4), ICTY Digest.

The Trial Chamber has already established the commission of other cases of rape and sexual assaults in the Keraterm and Omarska camps. . . . [T]hese crimes were committed with a discriminatory intent.”

(m) sexual assault

Brđjanin, (Trial Chamber), September 1, 2004, para. 1012: “Any sexual assault falling short of rape may be punishable as persecution under international criminal law, provided that it reaches the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute. This offence embraces all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim’s dignity.”

Stakić, (Trial Chamber), July 31, 2003, para. 757: “This Trial Chamber holds that, under international criminal law, not only rape but also any other sexual assault falling short of actual penetration is punishable. This offence embraces all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim’s dignity.”

(i) application—sexual assault in various prison camps and complexes including the Omarska and Keraterm camps and other detention facilities in the Prijedor area

Brđjanin, (Trial Chamber), September 1, 2004, para. 1013: “The Trial Chamber finds that many incidents of sexual assault occurred [in various prison camps and complexes including the Omarska Camp and other camps in the Prijedor area], including the case of a Bosnian Croat woman who was forced to undress herself in front of cheering Bosnian Serb policemen and soldiers. In another incident, a knife was run along the breast of a Bosnian Muslim woman. Frequently, it was demanded that detainees perform sex with each other. In each incident, armed Bosnian Serb soldiers or policemen were the perpetrators. The Trial Chamber is satisfied that, evaluated in their context, these acts are serious enough to rise to the level of crimes against humanity. Moreover, the Trial Chamber is satisfied that the circumstances surrounding the commission of sexual assaults leave no doubt at all that there was discrimination in fact and discriminatory intent on the part of the direct perpetrators, based on racial, religious or political grounds.”

Stakić, (Trial Chamber), July 31, 2003, para. 806: “The Trial Chamber has already established the commission of . . . cases of . . . sexual assaults in the Keraterm and Omarska camps. As discussed above, these crimes were committed with a discriminatory intent.”

(n) terrorizing the civilian population

(i) elements

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 589: “While the act of ‘terrorising the civilian population’ is not found in the Statute, the Trial Chamber finds that it is similar to ‘[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population’ prohibited under Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions. Based on the prohibitions enshrined in these two Articles and taking into consideration the *Galic* Trial Judgement, the Trial Chamber defines the elements of ‘terrorising the civilian population’ as follows:

1. Acts or threats of violence;
2. The offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts or threats of violence; and
3. The acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.”

(ii) actual infliction of terror unnecessary

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 590: “The Trial Chamber concurs with the *Galic* Trial Chamber finding that ‘terror’ means ‘extreme fear.’ The plain wording of Article 51(2) of Additional Protocol I does not suggest that the ‘terrorising of the civilian population’ requires an actual infliction of terror. The Trial Chamber therefore finds that the Prosecution only needs to prove that acts or threats of violence were carried out to create an atmosphere of extreme fear or uncertainty of being subjected to violence among the civilian population.”

(iii) primary purpose must be spreading terror

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 591: “As one element of the offence is the primary purpose of spreading terror, the offender must have intended to terrorise the civilian population. The Trial Chamber finds that ‘primary’ does not mean that the infliction of terror needed to be the only objective of the acts or threats of violence, but that it was the principal aim.”

(iv) terrorization violates a fundamental right laid down in international customary and treaty law

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 592: “In addition to the prohibition against acts or threats of violence enshrined in the Geneva Conventions, the Trial Chamber observes that the exposure to terror is a denial of the fundamental right to security of person which is recognised in all national systems and is contained in Article 9 of the ICCPR [International Covenant on Civil and Political Rights] and Article 5 of the ECHR [European Convention for the Protection of Human Rights and

Fundamental Freedoms]. Accordingly, the Trial Chamber finds that terrorisation violates a fundamental right laid down in international customary and treaty law.”

See also “terror against the civilian population” as a crime under Article 3, Section (II)(d)(xv), ICTY Digest.

(v) application—terrorizing the civilian population

(a) Srebrenica and Potocari

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 611-614, 620: “It has been established that the UN compound in Srebrenica town was shelled while thousands of Bosnian Muslim refugees were seeking protection there. It has further been established that while the refugees were fleeing from Srebrenica to Potocari, elements of the Bratunac Brigade [a unit of the Army of Republika Srpska], among others, fired at them. The Trial Chamber finds that the aim of the shellings was to cause fear and panic among the civilian population and force the people to flee the Srebrenica enclave.”

“The Trial Chamber further finds that the Bosnian Muslims who sought shelter in Potocari were continuously subjected to terrifying threats and physical attacks. It has been established that during the meetings in the Hotel Fontana, the Bosnian Muslim representatives were threatened repeatedly and told that they ‘could either survive or disappear.’ Many [Army of the Republika Srpska] soldiers cursed at the Bosnian Muslims, calling them names and saying that they would be ‘slaughtered.’ Especially during the night of 12 July, ‘the night of horror,’ the refugees suffered from extreme fear.”

“It has also been proven that the Bosnian Muslim men who were taken to the ‘White House’ were forced to leave their personal belongings and identity cards outside the building. The Trial Chamber finds the message sent to the men when their identity cards were taken – that they would no longer need this most basic document – was intended to terrify the men as it suggested that their fate – death – had been sealed. It has been further established that Bosnian Muslim men were told to take off their clothes and shoes before they were transported from the detention to the execution sites. The Trial Chamber finds this to be another tool used to instil fear and suggest to the men that they were marked for death.”

“The Trial Chamber finds that there is sufficient evidence to establish that the described unlawful acts and threats of violence against the Bosnian Muslim civilians, including individual civilians not taking part in hostilities, were carried out with the primary purpose to create an atmosphere of extreme fear among the population.”

“The Trial Chamber finds that there is sufficient evidence to establish beyond reasonable doubt that the murder, the cruel and inhumane treatment and the terrorising of the civilian population as described above constitute blatant denials of fundamental rights that had a severe impact on the victims and therefore amount to persecutions.”

Obrenovic, (Trial Chamber), December 10, 2003, para. 36: Where the accused pled guilty to persecution as a crime against humanity, the Trial Court recognized: “The Bosnian Muslim civilians who had been transferred from Srebrenica and Potocari to Zvornik during the dates of 13 to 16 July 1995 were subjected to terrorisation. At detention centres and execution sites, the civilians were mistreated and abused.”

Nikolic – Momir, (Trial Chamber), December 2, 2003, para. 38: “During the time-period that the Bosnian Muslim refugee population from Srebrenica was in and around Potocari, members of the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] terrorised the population [I]his took the form of intimidation and abuse, with the purpose of compelling the Muslim population to get on the buses and trucks to Kladanj.”

(o) attacks launched deliberately against civilians or civilian objects/attacks on civilians, cities, towns and villages

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 104, 105: “[T]he Appeals Chamber holds that attacks launched deliberately against civilians or civilian objects may constitute persecutions as a crime against humanity.” An “unlawful attack launched deliberately against civilians or civilian objects may constitute a crime of persecutions without the requirement of a particular result caused by the attack(s).”

Blaskic, (Appeals Chamber), July 29, 2004, para. 159: “In light of the customary rules on the issue [specifically, Articles 51(2) – 51(4) of Additional Protocol I, Article 13(2) of Additional Protocol II, and Article 25 of the Fourth Hague Convention of 1907], the Appeals Chamber holds that attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages, may constitute persecutions as a crime against humanity.” See also *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 157-158.

Deronjic, (Trial Chamber), March 30, 2004, para. 121: “An attack on a village is not listed under Article 5 of the Statute. The Trial Chamber in *Kordic and Cerkez* when assessing the level of gravity of this crime, held that the unlawful attack on cities, towns and villages, ‘is akin to an “attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings,” a violation of the laws or customs of war enumerated under Article 3 (c) of the Statute’ and therefore when committed on discriminatory grounds constitutes the act of Persecutions.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 203: The following “acts may constitute the crime of persecution provided they are performed with the requisite discriminatory intent:” attacking cities, towns and villages.

(p) forced labor

Krnjelac, (Appeals Chamber), September 17, 2003, para. 199: “[F]orced labour must be considered as part of a series of acts comprising unlawful detention and beatings whose cumulative effect is of sufficient gravity to amount to a crime of persecution, given that the unlawful detention and beatings were based on one or more of the discriminatory grounds listed under Article 5 of the Statute. Accordingly, the degree of gravity of persecution based on those acts is the same as that of the crimes expressly laid down under Article 5 of the Statute.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 85, 93: “Trial Chambers of the Tribunal have held that the charge of ‘forced labour assignments’ may constitute the basis of the crime of enslavement as a crime against humanity under Article 5(c), and the offence of slavery as a violation of the laws or customs of war under Article 3 of the Statute, and as such this offence is of sufficient gravity to support a charge of persecution.”

“The Trial Chamber finds that forced labour assignments which require civilians to take part in military operations violate the fundamental norms of international humanitarian law The Trial Chamber is also satisfied that forced labour assignments which result in exposing civilians to dangerous or humiliating conditions amount to cruel and inhumane treatment. These acts reach the same level of gravity as the other crimes against humanity and if performed with the requisite discriminatory intent may constitute persecution.”

(i) permissible work distinguished

Krnjelac, (Appeals Chamber), September 17, 2003, para. 200: “There is a principle which states that the work required of a person in the ordinary course of lawful detention is not regarded as forced or compulsory labour. This principle is enshrined in, *inter alia*, Article 4(3) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’). It sets out that “‘forced or compulsory labour’ shall not include: a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention [governing notably the lawfulness of an arrest or detention] or during conditional release from such detention.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 836: “The Trial Chamber accepts the argument of the Defence that certain types of work even if compulsory were permissible under international humanitarian law and consequently do not amount to persecution.”

For discussion of “forced labor” as a form of slavery under Article 3, see (II)(d)(xiv)(3), ICTY Digest. For discussion of forced labor as a form of cruel treatment under Article

3, see (II)(d)(iii)(6)(b), ICTY Digest. For discussion of enslavement under Article 5(c) (including discussion of permissible work), see (IV)(d)(iii), ICTY Digest.

(ii) application—forced labor

(a) KP Dom prison complex in Foca

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 194-195, 201: “The Appeals Chamber notes that the living conditions at the KP Dom [prison complex in Foca] were clearly appalling. Of the facts set out above, some are particularly significant and should be emphasised. The Trial Chamber concluded that, at the KP Dom, there was a deliberate policy to feed the non-Serb detainees barely enough for their survival. All non-Serb detainees suffered considerable weight loss ranging from 20 to 40 kilograms during their detention at the KP Dom. Moreover, non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back. Some, however, were taken out to work knowing that they would receive additional and much needed food if they did. Finally, the non-Serb detainees were subjected to harrowing psychological abuse during their period of detention at the KP Dom. The detainees were exposed to the sounds of people being beaten and tortured over a period of months, in particular in June and July 1992, and they constantly feared that they would be the next to be selected. The Appeals Chamber holds that, given the specific detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have arrived at the conclusion that the detainees’ general situation negated any possibility of free consent. The Appeals Chamber is satisfied that the detainees worked to avoid being beaten or in the hope of obtaining additional food. Those who refused to work did so out of fear on account of the disappearances of detainees who had gone outside of the KP Dom. The climate of fear made the expression of free consent impossible and it may neither be expected of a detainee that he voice an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for forced labour to be established. In such circumstances, the fact that a detainee raised an objection is immaterial in ascertaining whether it was truly impossible to object.”

“The Appeals Chamber holds that the specific circumstances of the KP Dom detainees’ prison life were therefore such as to make free consent impossible.”

“In the Appeals Chamber’s opinion, there can be no doubt that the non-Serb prisoners were detained and forced to work on account of their ethnicity. The Trial Chamber emphasised that “[t]he few Serb convicts who were detained at the KP Dom [prison complex] were kept in a different part of the building from the non-Serbs. They were not mistreated like the non-Serb detainees. The quality and quantity of their food was somewhat better, sometimes including additional servings. They were not beaten or otherwise abused, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits

which were denied to non-Serb detainees.’ It is clear, however, that the non-Serb detainees were subjected to a wholly different regime. The overcrowding of the solitary confinement cells in which the detainees were so packed that they were unable to move around or lie down, the starvation and its principal effects in terms of weight loss, the widespread nature of the beatings and mistreatment and the psychological abuse linked to the detention conditions and mistreatment constitute circumstances particularly indicative of the discriminatory character of the acts of forced labour imposed upon the non-Serb detainees.”

**(b) Bosanski Samac, Brijeljina, Grebnice,
Zasavia, Pisaria, Lijekovica, Brvnik,
Prud, Teocak**

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 834, 835, 837, 841: “The Trial Chamber is satisfied that civilians who had to report every day in front of the Pensioner’s Home [in Bosanski Samac] as well as civilians who were detained were forced to dig trenches, build bunkers, carry sandbags or railway sleepers for the construction of trenches, and build other fortifications on the frontline. It has been established that this work was not rendered voluntarily. Civilians were compelled to work under the supervision of armed guards, who beat, or fired at those who tried to escape. The Trial Chamber also accepts that the civilians who were forced to dig trenches, and to work on the frontline were not paid for their work.”

“The Trial Chamber is satisfied that civilians working on military assignments on the frontline were exposed to dangerous conditions and were under a high risk of being injured or killed. The Trial Chamber accepts that the acts of forcing civilians to work in life-threatening circumstances where they could be exposed to physical and mental suffering fail to meet the obligation for humane treatment of civilians enshrined in the Geneva Conventions and amount to cruel and inhumane treatment. The Trial Chamber is satisfied that these assignments were made on a discriminatory basis and that they reach the level of seriousness required for persecution.”

“The Trial Chamber is satisfied that non-Serb civilians were subjected to humiliating forced labour. Sulejman Tihic was forced to sweep the street outside the municipality building and the [Secretariat of the Interior] building, while people walked by. Dragan Lukac had to clean a room in front of two Bosnian women and felt humiliated. Ahmet Hadzialijagic had to sweep the streets in front of the bank, which he used to manage. The director of a textile company had to sweep the compounds of the Samac textile industry. The Trial Chamber is satisfied that these assignments were such as to arouse feelings of fear and subordination, capable of causing the said persons psychological suffering, and of debasing them and the group to which they belonged, and as such constitute cruel and inhumane treatment. While single incidences of humiliating assignments may not reach the level of gravity required for persecution, the Trial Chamber accepts that these assignments were part of a pattern targeting the

Bosnian Muslim and Bosnian Croat political and economic leadership. The Trial Chamber is satisfied that the humiliating assignments reach the level of gravity to amount to persecution.” “The Trial Chamber finds that through the Secretariat for National Defence the Crisis Staff was ultimately responsible for managing the forced labour program and sending civilians to work in dangerous or humiliating conditions.”

**(c) Bosanski Samac, Zasavica, Novi Grad,
Pisari and other neighboring villages,
and Odzak—not forced labor**

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 836: “Civilians were forced to do agricultural work in Bosanski Samac, Zasavica, Novi Grad, Pisari and other neighbouring villages, to chop wood, to prepare food for the army or for the civilians, to work on the water supply system, to clean and rebuild Odzak, or to work for state owned companies. While the civilians had no real choice as to whether to work or not, these types of labour are lawful *per se* under international humanitarian law, and in the absence of other aggravating circumstances do not amount to persecution. It has not been established beyond reasonable doubt that the conditions under which this labour was rendered were such as to amount to cruel and inhumane treatment, or that the assignments are of sufficient gravity to constitute persecution.”

**(q) forcible transfer, sexual violence, subjection to inhumane
conditions and atmosphere of terror**

(i) application—the Susica camp

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 111: “The Trial Chamber finds that the situation in [the] Susica camp, as previously described, was that serious that the acts of forcible transfer, sexual violence, subjection to inhumane conditions and atmosphere of terror rise without further explanation to a level of gravity that falls within the ambit of Article 5 of the Statute.”

See *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, paras. 57-61 for a discussion of conditions at the Susica detention camp, where, in a warehouse or hangar approximately 50 by 30 meters, as many as 8,000 Muslim civilians and other non-Serbs from Vlasenica and the surrounding villages were successively detained, with the number of detainees at any one time usually between 300 and 500.

**(r) killings, beatings, unlawful attacks on civilians and civilian
objects, the unlawful imprisonment of civilians,
destruction of civilian objects, and looting**

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 672, 673: “The underlying acts include killings, beatings, unlawful attacks on civilians and civilian

objects, the unlawful imprisonment of civilians, destruction of civilian objects, and looting. All of them, considered in conjunction, amount to a criminal conduct of gravity equal to crimes listed in Article 5 of the Statute.” “In accordance with settled jurisprudence, the Appeals Chamber holds that these acts constitute criminal conduct of a gravity equal to the crimes listed in Article 5 of the Statute.”

(s) political, social, economic rights violations, including the right to employment, right to freedom of movement, right to proper judicial process, and right to proper medical care

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 615: “Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights.”

Blaskic, (Trial Chamber), March 3, 2000, para. 220: “[I]nfringements of the elementary and inalienable rights of man, which are ‘the right to life, liberty and the security of person,’ the right not to be ‘held in slavery or servitude,’ the right not to ‘be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and the right not to be ‘subjected to arbitrary arrest, detention or exile’ as affirmed in Articles 3, 4, 5 and 9 of the Universal Declaration of Human Rights, by their very essence may constitute persecution when committed on discriminatory grounds.”

(i) rights violations need not be set out in the ICTY Statute

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1029, 1030: “The Prosecution charges the Accused with ‘the denial of fundamental rights to Bosnian Muslims and Bosnian Croats, including the right to employment, freedom of movement, right to proper judicial process, or right to proper medical care’ as persecutions.” “As a preliminary matter, the Trial Chamber notes the argument raised by the Accused that ‘no conviction may be based on the denial of any of these [four] rights since they are not specifically set out in the Statute. Any conviction for a violation of these rights violates the principle of legality.’ The Trial Chamber finds that this argument is misconceived as the Accused is obviously confusing the underlying acts or violations with the actual crime charged, namely that of persecution. The underlying acts (and corresponding violations) alleged are encompassed by the crime of persecution, set out in the Statute and charged under Count 3 of the Indictment. Any possible conviction would be for this crime and not for the underlying acts or violations. It is well established in the jurisprudence of this Tribunal that a conviction for the crime of persecution does not violate the principle of legality. This argument is therefore rejected.”

(ii) evaluate rights violations on a case by case basis to determine gravity, considering the cumulative effect of the violations

Brđjanin, (Trial Chamber), September 1, 2004, para. 1031: “The jurisprudence of this Tribunal has specified that acts which deny fundamental rights may amount to persecution provided they are of sufficient gravity or severity. The Trial Chamber reiterates its view that there is no list of established fundamental rights and that such decisions are best taken on a case by case basis. In order to establish the crime of persecution, underlying acts should not be considered in isolation, but in context, looking at their cumulative effect. The Trial Chamber considers that it is not necessary to examine the fundamental nature of each right individually, but rather to examine them as a whole. It is appropriate, therefore, to look at the cumulative denial of the rights to employment, freedom of movement, proper judicial process and proper medical care in order to determine whether these are fundamental rights for the purposes of establishing persecutions.”

(iii) application—violations of the right to employment, the right to freedom of movement, the right to proper judicial process and the right to proper medical care

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1032-49: The court determined that the following rights violations “taking into account the cumulative effect of their denial” were committed on discriminatory grounds: right to employment; right to freedom of movement; right to proper judicial process; right to proper medical care. These rights violations were “fundamental rights for the purposes of establishing persecution.” “The Trial Chamber is also satisfied that the denial of these rights to Bosnian Muslims and Bosnian Croats was of equal gravity to other crimes listed in Article 5 of the Statute as well as discriminatory in fact and was carried out with the requisite discriminatory intent by the direct perpetrators on racial, religious and political grounds.”

(t) issuance of discriminatory orders, policies, decisions or other regulations

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 58: “[I]ssuance of discriminatory orders, policies, decisions or other regulations may constitute the *actus reus* of persecution, provided that these orders infringe upon a person’s basic rights and that the violation reaches the level of gravity of the other crimes against humanity listed in Article 5 of the Statute. Such a determination has to be made on a case by case basis, taking account of the specific factual circumstances, and of the cumulative effect of such decisions or regulations.”

(u) use of civilians as hostages and human shields

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 107: “The Appeals Chamber considers that the acts charged in the Indictment which encompass the use of detained Bosnian Muslim civilians as hostages and human shields, their use to dig trenches in hostile, hazardous and combat conditions, and their subjection to physical and psychological abuse all rise to the level of gravity of the other crimes enumerated in Article 5 of the Statute.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 155: “The Appeals Chamber considers that the acts charged in the Indictment which encompass the detention of Bosnian Muslim civilians who were . . . [among other things] used as human shields . . . all rise to the level of gravity of the other crimes enumerated in Article 5.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 204: The following “acts may constitute the crime of persecution provided they are performed with the requisite discriminatory intent.” trench-digging and use of hostages and human shields.

(v) summary of acts covered

Kročka et al., (Trial Chamber), November 2, 2001, para. 186: “[T]he ICTY have found that the following acts may constitute persecution when committed with the requisite discriminatory intent: imprisonment, unlawful detention of civilians or infringement upon individual freedom, murder, deportation or forcible transfer, ‘seizure, collection, segregation and forced transfer of civilians to camps,’ comprehensive destruction of homes and property, the destruction of towns, villages and other public or private property and the plunder of property, attacks upon cities, towns and villages, trench-digging and the use of hostages and human shields, the destruction and damage of religious or educational institutions, and sexual violence.”

**(w) acts that alone did not rise to the level of persecution:
encouraging and promoting hatred on political grounds;
dismissing and removing individuals from government;
forcible takeover; and interrogations**

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, paras. 55-56 “The Trial Chamber notes that a forcible takeover, as an illegal *coup d’état*, is a political move to overthrow an existing government by force, and does not necessarily encompass all the elements and the gravity associated with an attack on cities, towns or villages. The Trial Chamber notes the *Kordić* Trial Judgement finding that the exclusion of Bosnian Muslims from the government does not rise to the level of gravity as the other crimes against humanity and consequently does not constitute persecution. The *Kordić* Trial Chamber held further that the criminal prohibition of removal of members of government on discriminatory grounds has not reached the level of customary international law.”

“[A] forcible takeover, *per se*, does not reach the level of gravity as the other crimes against humanity and on its own does not amount to persecution. The Trial Chamber notes however that a forcible takeover may serve as the basis for perpetration of other persecutory acts as it provides the conditions necessary for adoption and enforcement of policies infringing upon basic rights of citizens on the basis of their political, ethnic, or religious background.”

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, paras. 67, 69: “[I]nterrogations alone have not been considered by the Tribunal to be of sufficient gravity to constitute offences charged in the Statute, such as persecution or torture, as crimes against humanity.” “The Trial Chamber concludes that the interrogation of Bosnian Croats, Bosnian Muslims and other non-Serb civilians who had been arrested and detained, and forcing them to sign false and coerced statements, *as alleged in themselves*, do not meet the seriousness requirement to constitute persecution and a crime against humanity. They may, however, form part of a series of acts which comprise an underlying persecutory act, for example, when considered with the charge of persecution on political, racial or religious grounds for the acts of unlawful arrest or confinement of Bosnian Croats, Bosnian Muslims and other non-Serb civilians . . . ; and specifically, when considering the legality of the alleged unlawful arrest or confinement. Such acts are also related to the charge of persecution for acts of cruel and inhumane treatment, that include beatings and torture . . . ; and may be considered cumulatively.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, paras. 208-210: The following acts do not constitute persecution as a crime against humanity because they do not rise to the same level of gravity as the other crimes against humanity enumerated in Article 5:

- encouraging and promoting hatred on political grounds;
- dismissing and removing Bosnian Muslims from government.

(4) *mens rea* for persecution

(a) discriminatory intent required for persecution

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 460: “With regard to the required *mens rea* [for persecution], the Appeals Chamber reiterates that persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds.” *See also Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 110, 674 (same); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 164 (same).

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 711: “The . . . *mens rea* for all crimes against humanity [requires the following showing]: namely, the accused must know that there is a widespread or systematic attack on the civilian population and that his acts comprise part of that attack. In addition, for persecutions, a crime against

humanity, the specific intent to discriminate on political, racial, or religious grounds must be proved.”

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 113: “[A]s held by the Appeals Chamber in the *Krnjelac* Appeals Judgement, [the *mens rea* of the crime of persecution requires proof that the act or omission] ‘was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics’”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 184: “The Appeals Chamber reiterates that, in law, persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite discriminatory intent.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 996: “The crime of persecution also derives its unique character from the requirement of a specific discriminatory intent. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.”

Simic, Tadic, and Zoric, (Trial Chamber), October 17, 2003, para. 51: “The crime of persecution is uniquely distinguishable from the other Article 5 crimes by the requirement of an intent to discriminate on racial, religious or political grounds. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.”

Stakic, (Trial Chamber), July 31, 2003, para. 738: “The Trial Chamber recalls that the *mens rea* of the crime of persecutions, apart from the knowledge required for all crimes against humanity listed in Article 5 of the Statute, consists of:

- the intent to commit the underlying act, and
- the intent to discriminate on political, racial or religious grounds.

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 212: “[A] particular intent is required, in addition to the specific intent (to commit the act and produce its consequences) and the general intent (objective knowledge of the context in which the accused acted). This intent – the discriminatory intent – is what sets the crime of persecution apart from other Article 5 crimes against humanity. This discriminatory intent requirement for the crime of persecution is thus different from the more general level of intent required for the other crimes against humanity under Article 5, when mere ‘knowledge of the context’ of a widespread or systematic attack against a civilian population is sufficient.” (underlining removed)

See also *Stakic*, (Trial Chamber), July 31, 2003, para. 737: “The Trial Chamber opines that

the terms ‘discriminatory intent’ amounts to the requirement of a ‘*dolus specialis*.’”

(b) *mens rea* requirement for persecution higher than for other crimes against humanity, but lower than for genocide

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 636: “[T]he *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. [P]ersecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. [F]rom the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.”

(c) intent to target group, not individuals

Blaskic, (Appeals Chamber), July 29, 2004, para. 165: “The Trial Chamber was correct when it held . . . that the *mens rea* for persecutions ‘is the specific intent to cause injury to a human being because he belongs to a particular community or group.’”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 636: “A discriminatory basis exists where a person is targeted on the basis of religious, political or racial considerations, i.e. for his or her membership in a certain victim group that is targeted by the perpetrator group. . . . [T]he targeted group does not only comprise persons who *personally* carry the (religious, racial or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular, include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*. . . . [T]his interpretation is consistent with the underlying *ratio* of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. The Chamber finds that in such cases, a factual discrimination is given as the victims are *discriminated in fact* for who or what they are on the basis of the perception of the perpetrator.”

Blaskic, (Trial Chamber), March 3, 2000, para. 235: The “perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.”

(d) discriminatory intent may be shown by political, racial or religious discrimination

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 52: “Although the Statute refers to the listed grounds in the conjunctive [“persecution on political, racial and religious grounds”], it is settled in the jurisprudence of the Tribunal that the presence of discriminatory intent on any one of these grounds is sufficient to fulfil the *mens rea* requirement for persecution.”

(e) discriminatory intent may be shown by positive or negative criteria

Krvocka et al., (Trial Chamber), November 2, 2001, para. 195: “[T]he discriminatory act could result from the application of positive or negative criteria.” For example, “an attack ‘conducted against only the non-Serb portion of the population because they were non-Serbs’ was indicative of the necessary discriminatory intent.”

(f) inferring discriminatory intent

(i) discriminatory intent may not be inferred directly from the general discriminatory nature of an attack

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 460: “This intent [for persecution as a crime against humanity] may not be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity; such a context may not in and of itself amount to evidence of discriminatory intent.” *See also Krvocka et al.*, (Appeals Chamber), February 28, 2005, para. 366; *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 110, 674; *Blaskic*, (Appeals Chamber), July 29, 2004, para. 164; *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 184; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 584; *Brđanin*, (Trial Chamber), September 1, 2004, para. 997.

But see Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 584: “When those acts [charged as persecution] formed part of an attack of a discriminatory nature, this context can be a sufficient basis to infer the discriminatory intent in relation to each particular act.”

For discussion that discriminatory intent may be inferred directly from the general discriminatory nature of an attack where there is an indirect perpetrator, see “where

indirect perpetrator, proof is required only of general discriminatory intent in relation to the attack,” Section (IV)(d)(viii)(4)(i), ICTY Digest.

(ii) discriminatory intent may be inferred from the context of the attack if it is substantiated by surrounding circumstances

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 366: “[D]iscriminatory intent may be inferred from the context of the attack, provided it is substantiated by the surrounding circumstances of the crime.” See also *Krvocka et al.*, (Appeals Chamber), February 28, 2005, para. 460 (similar); *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 110, 674; *Blaskic*, (Appeals Chamber), July 29, 2004, para. 164; *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 184; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 584; *Brđjanin*, (Trial Chamber), September 1, 2004, para. 997.

See also *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 185: “[T]he Appeals Chamber considers that the fact that [circumstances surrounding the commission of the alleged acts] may allow the *actus reus* of persecution (i.e. the discriminatory nature of an act) to be established does not preclude a Trial Chamber from giving consideration to those circumstances, as well as other factors, to establish the *mens rea* of the offence, that is the discriminatory intent on the basis of which the discriminatory act was committed.”

(iii) factors to consider

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 460: “Circumstances which may be taken into consideration [when inferring discriminatory intent regarding persecution] include the systematic nature of the crimes committed against a racial or religious group and the general attitude of the alleged perpetrator as demonstrated by his behaviour.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 715: “The Appeals Chamber now turns to the specific intent to discriminate on political, racial, or religious grounds and wants to stress first that such a specific intent in general can only be inferred from objective facts and the general conduct of an accused seen in its entirety. Only on rare occasions it will be possible to establish such an intent on documents laying down a perpetrator’s own *mens rea*.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 184: “Circumstances which may be taken into consideration [in inferring discriminatory intent] include the operation of the prison (in particular, the systematic nature of the crimes committed against a racial or religious group) and the general attitude of the offence’s alleged perpetrator as seen through his behaviour.”

(iv) intent may be inferred from a perpetrator's knowing participation in a system

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 51: "Trial Chambers have inferred discriminatory intent through a perpetrator's knowing participation in a system or enterprise that discriminates on political, racial or religious grounds."

Kvočka et al., (Trial Chamber), November 2, 2001, para. 201: "[D]iscriminatory intent of a perpetrator [where there exists a joint criminal enterprise] can be inferred from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds."

(v) application—inferring discriminatory intent from the fact that beatings were inflicted only on non-Serb prison detainees

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 366: "[T]he Appeals Chamber found in the case *Prosecutor v. Krnojelac* that, when beatings were inflicted only on the non-Serb detainees in a prison, it was reasonable to conclude that these beatings were committed because of the political or religious affiliation of the victims, and that these acts were committed with the requisite discriminatory intent. In the present case, it appears that almost all the detainees in the camp belonged to the non-Serb group. It was reasonable to conclude that the reason for their detention was their membership in this group and therefore of a discriminatory nature."

(g) no requirement of discriminatory policy

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 341: "In his Reply Brief, Kvočka accepts that there is no requirement that a discriminatory policy existed or that the accused took part in the formulation of such a policy and submits that this subsection of his ground of appeal does not need to be considered."

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 582: "While persecutory acts might often be part of a discriminatory policy, the existence of a discriminatory policy is not a necessary requirement for persecutions." *See also Kupreskić et al.*, (Trial Chamber), January 14, 2000, para. 625 (similar).

Brđjanin, (Trial Chamber), September 1, 2004, para. 997: "There is no requirement under persecution that a discriminatory policy exist or that, in the event that such a policy is shown to have existed, the accused need to have taken part in the formulation of such discriminatory policy or practice by a governmental authority." *See also Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 51 (same); *Vasićević*, (Trial Chamber), November 29, 2002, para. 248 (similar); *Krnojelac*, (Trial Chamber), March 15, 2002, para. 435 (same).

Stakić, (Trial Chamber), July 31, 2003, para. 739: “The requirement that an accused intend to discriminate does not require the existence of a discriminatory policy.”

(h) persecutory intent—the removal of targeted persons from society or humanity—not required

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 111: “Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions. The Appeals Chamber holds that the *mens rea* for persecutions ‘is the specific intent to cause injury to a human being because he belongs to a particular community or group.’ The Appeals Chamber stresses that there is no requirement in law that the actor possess a ‘persecutory intent’ over and above a discriminatory intent.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 165: “Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions. The Appeals Chamber further dismisses the Appellant’s allegation that a discriminatory purpose alone is insufficient to establish the *mens rea* for the crime of persecutions. The Trial Chamber was correct when it held at paragraph 235 of the Trial Judgement that the *mens rea* for persecutions ‘is the specific intent to cause injury to a human being because he belongs to a particular community or group.’ The Appeals Chamber stresses that there is no requirement in law that the actor possess a ‘persecutory intent’ over and above a discriminatory intent.”

(i) knowledge that one is acting in a way that is discriminatory is insufficient; must intend to discriminate

Vasićević, (Trial Chamber), November 29, 2002, para. 248: “The accused must consciously intend to discriminate for persecution to be established. It is not sufficient that the accused was merely aware that he is in fact acting in a discriminatory way.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 435: “The crime of persecution also derives its unique character from the requirement of a specific discriminatory intent. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.”

(j) intent to discriminate need not be the primary intent, but must be a significant one

Krnjelac, (Trial Chamber), March 15, 2002, para. 435: “While the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one.”

(k) personal motives irrelevant to finding of intent

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 463: “The Trial Chamber explicitly noted that crimes against humanity can be committed for purely personal reasons. The Appeals Chamber confirms that

the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

Motive and intent must be distinguished. Personal motives, such as settling old scores, or seeking personal gain, do not exclude discriminatory intent. They may become relevant at the sentencing stage in mitigation or aggravation of the sentence, but they do not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity.”

(i) application—personal motives: the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 367, 369-370: “Radic argues that he did not share the goal of the discriminatory policy, but that he reluctantly served in the [Omarska] camp only because of the explicit orders of his superior. The Appeals Chamber recalls that discriminatory intent must be distinguished from the motive for doing so. The Trial Chamber inferred Radic’s discriminatory intent from his knowledge of the persecutory nature of the crimes, and his knowing participation in the system of persecution pervading Omarska camp. The Appeals Chamber finds that it was reasonable to reach the conclusion that Radic acted with discriminatory intent from the facts of the case, regardless of his personal motives for doing so. His personal motives may become relevant at the sentencing stage, but not as to the finding of his criminal intent.”

“Radic also asserts that the acts of rape and sexual violence charged do not involve discrimination based on religion, ethnicity, or political belief. He submits that the Trial Chamber found personal motives in the acts of rape as persecution, but failed to establish what constituted his discriminatory intent.” “The Appeals Chamber finds that Radic, again, does not distinguish between intent and motive. The Trial Chamber found that the sexual violence was directed only against women of non-Serb origin, and Radic does not contest this finding. It was, for the reasons set out in the preceding section, reasonable to conclude that Radic acted with the required discriminatory intent, notwithstanding his personal motives for committing these acts.”

(l) generally, discriminatory intent must relate to the act charged as persecution, not the attack

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 584: “The intent to discriminate must be related to the particular act(s) charged as persecutions.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 51: “The discriminatory intent must relate to the specific act or omission underlying the charge of persecution as opposed to the attack in general, notwithstanding the fact that the attack may also in practice have a discriminatory aspect.”

Stakic, (Trial Chamber), July 31, 2003, para. 740: “In the *Vasiljevic* case, the Trial Chamber held that

[...] the discriminatory intent must relate to the specific act charged as persecution. It is not sufficient that the act merely occurs within an attack which has a discriminatory aspect.

In this context, the Trial Chamber in that case criticised the fact that, in other cases before the Tribunal, it was held that ‘a discriminatory attack is a sufficient basis from which to infer the discriminatory intent of acts carried out within that attack.’ It continued by stating that

[t]his approach may lead to the correct conclusion with respect to most of the acts carried out within the context of a discriminatory attack, but there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Accordingly, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts that occur within that context.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 436: “The discriminatory intent must relate to the specific act charged as persecution rather than the attack in general, even though the latter may also in practice have a discriminatory aspect. This is clear from the definition of persecution which requires an act or omission that is in fact persecutory. There is no requirement, either under the crime of persecution or under the general requirements for crimes against humanity, that the attack in general be discriminatory. [T]he law has . . . been applied by this Tribunal on the basis that an attack on discriminatory grounds is a sufficient basis from which to infer the necessary discriminatory intent for persecution. While such an approach would probably reach the correct conclusion for most acts occurring within the context of a discriminatory attack, there may be certain acts committed within the context of the attack either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Therefore, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts.” *See also Vasiljevic*, (Trial Chamber), November 29, 2002, para. 249 (similar).

(i) where indirect perpetrator, proof is required only of general discriminatory intent in relation to the attack

Stakić, (Trial Chamber), July 31, 2003, paras. 741-743, 746, 774: “This Trial Chamber . . . is of the view that the role of the particular accused has a significant impact on the question whether proof is required of a discriminatory intent in relation to each specific act charged, or whether it would suffice that proof of a discriminatory attack is a sufficient basis from which to infer the discriminatory intent in relation to acts forming part of that attack. In both the *Vasićević* and *Krnjelac* cases, the accused were closely related to the actual commission of crimes. In such cases, this Trial Chamber might agree that proof is required of the fact that the direct perpetrator acted with discriminatory intent in relation to the specific act. In the present case, however, the Accused is not alleged to be the direct perpetrator of the crimes. Rather, as the leading political figure in Prijedor municipality, he is charged as the perpetrator behind the direct perpetrator/actor and is considered the co-perpetrator of those crimes together with other persons with whom he co-operated in many leading bodies of the Municipality. The Trial Chamber deliberately uses both terms ‘perpetrator’ and ‘actor’ because it is immaterial for the assessment of the intent of the indirect perpetrator whether or not the actor had such a discriminatory intent; the actor may be used as an innocent instrument or tool only.”

“In such a context, to require proof of the discriminatory intent of both the Accused and the acting individuals in relation to all the single acts committed would lead to an unjustifiable protection of superiors and would run counter to the meaning, spirit and purpose of the Statute of this International Tribunal. This Trial Chamber, therefore, holds that proof of a discriminatory attack against a civilian population is a sufficient basis to infer the discriminatory intent of an accused for the acts carried out as part of the attack in which he participated as a (co-) perpetrator.”

“In cases of indirect perpetration, proof is required only of the general discriminatory intent of the indirect perpetrator in relation to the attack committed by the direct perpetrators/actors. Even if the direct perpetrator/actor did not act with a discriminatory intent, this, as such, does not exclude the fact that the same act may be considered part of a discriminatory attack if only the indirect perpetrator had the discriminatory intent.” “[I]t is immaterial whether or not the direct perpetrator had, or even shared, the intent of the indirect perpetrator who acts on a higher level. What counts is the discriminatory intent of the indirect perpetrator.”

“[T]he Trial Chamber has determined that for a persecutorial act, a different discriminatory intent must be proved depending on the position of the perpetrator. In case of a persecutorial attack, it must be proved on the level of the indirect (co-) perpetrator behind the perpetrator/actor. However, proof of individual crimes committed by the direct perpetrators with discriminatory intent may be of assistance.”

(m) *mens rea* for ordering, planning or instigating crime of persecution

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 112: “[T]he Appeals Chamber considers that a person who orders, plans or instigates an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, plan or instigation, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering, planning or instigating. Ordering, planning or instigating with such awareness has to be regarded as accepting that crime. Thus, an individual who orders, plans or instigates an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the execution of the order, plan or instigation, may be liable under Article 7(1) of the Statute for the crime of persecutions.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 166: “[T]he correct legal standard . . . is that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. Thus, an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the order’s execution, may be liable under Article 7(1) for the crime of persecutions.”

For discussion of the *mens rea* for ordering, planning and instigating under Article 7(1), see (V)(c)(iii)(2), (V)(c)(i)(2) and (V)(c)(ii)(2) respectively, ICTY Digest.

(n) *mens rea* for crime of persecution where joint criminal enterprise/ *mens rea* for aider and abettor of persecution

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 110: “[F]or crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime.”

Compare Vasiljević, (Appeals Chamber), February 25, 2004, para. 142: “In order to convict [Vasiljević] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that the Appellant had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate against the Muslim population, and that, with that knowledge, the Appellant made a substantial contribution to the commission of the discriminatory acts by the principal perpetrators.”

For discussion of the *mens rea* for aiding and abetting a joint criminal enterprise under Article 7(1), see (V)(e)(vi)(3), ICTY Digest.

For the “difference between ‘aiding and abetting,’ and ‘co-perpetration in a joint criminal enterprise’ (*i.e.*, acting pursuant to a common design or purpose),” see Section (V)(e)(vi), ICTY Digest.

For discussion of “whether one may aid and abet a joint criminal enterprise,” see (V)(e)(vii), ICTY Digest.

(o) application—persecution—*mens rea*

(i) the Omarska, Keraterm and Trnopolje camps

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 461, 345-347, 455: “Considering that all the crimes Žigic was convicted of were committed in the framework of the Omarska, Keraterm and Trnopolje camps, that these camps were part of a widespread and systematic attack on the non-Serb civilian population, and that the overwhelming majority of detainees in these camps belonged to this group, the Trial Chamber correctly found that the discriminatory intent of Žigic against the detainees could be inferred from his activities within these camps.”

“Kvočka submits that his association with the Muslim community, his political affiliation and his duty as a professional policeman are facts that disprove the existence of a discriminatory intent.” “The Appeals Chamber concurs with the Trial Chamber’s reasonable and cogent finding that the crimes committed in the camp were committed with the intent to discriminate against and subjugate the non-Serb detainees, the ultimate aim of the joint criminal enterprise. Regarding Kvočka, the Trial Chamber found that he had the intent to discriminate against the non-Serbs detained in the camp. In this respect, the Appeals Chamber recalls that, on the question of Kvočka’s *mens rea*, it concluded that the Trial Chamber did not err when it found, based on the evidence before it, that Kvočka had the intent to contribute to the joint criminal enterprise of the Omarska camp. The Appeals Chamber is of the opinion that, in the context of the case, the intent to contribute to the joint criminal enterprise and discriminatory intent is one and the same thing.”

“[T]he Trial Chamber considered that when all the detainees were non-Serbs or those suspected of sympathizing with non-Serbs, it would be disingenuous to contend that religion, politics, and ethnicity did not define the group targeted for attack. In relation to the facts of the present case, the Trial Chamber noted:

[V]irtually all the offences alleged were committed against non-Serb detainees of the camps. The victims were targeted for attack on discriminatory grounds. While discriminatory grounds form the requisite criteria, not membership in a particular group, the discriminatory grounds in

this case are founded upon exclusion from membership in a particular group, the Serb group. [...] There is no doubt that the attacks specifically targeted the non-Serb population of Prijedor and purported to drive this population out of the territory or to subjugate those remaining. The Trnopolje and Keraterm camps appear to have been each established as part of a common plan to effectuate this goal, and the Omarska camp was clearly established to effectuate this goal.

Although the Trial Chamber made these observations in the context of the discussion of the *mens rea* for persecution, they also support the conclusion that the crimes committed in the camps discriminated in fact. In the Omarska camp, a few Bosnian Serbs were also detained, reportedly because they were suspected of having collaborated with the Muslims. Although the Trial Chamber's arguments mainly relate to the Omarska camp, it did not leave any doubt that the same conditions prevailed in the Keraterm and Trnopolje camps."

(ii) Prijedor municipality

Stakić, (Trial Chamber), July 31, 2003, paras. 818, 826: "The . . . findings lead the Trial Chamber to the conclusion that various crimes such as murder, torture, physical violence, rapes and sexual assaults were committed by the direct perpetrators with a discriminatory intent. What is crucial is that these crimes formed part of a persecutorial campaign headed *inter alia* by Dr. Stakić as (co-)perpetrator behind the direct perpetrators. He is criminally responsible for all the crimes and had a discriminatory intent in relation to all of them, whether committed by the direct perpetrator/actor with a discriminatory intent or not." "The Trial Chamber is satisfied beyond reasonable doubt that the Accused had the intent to discriminate against non-Serbs or those affiliated or sympathising with them because of their political or religious affiliations in the Prijedor municipality during the relevant time in 1992. The Trial Chamber therefore finds the Accused guilty as a co-perpetrator of the proven acts alleged under persecution, a crime against humanity under Article 5(h) of the Statute."

(iii) the Drina River incident in the municipality of Visegrad in south-eastern Bosnia-Herzegovina

Vasiljević, (Appeals Chamber), February 25, 2004, paras. 1, 143: The Trial Chamber found that on June 7, 1992, the Appellant, together with Milan Lukic and two unidentified men, forcibly transported seven Muslim men to the eastern bank of the Drina River, where they were shot. Five of the seven men died as a result of the shooting and two survived by falling into the river, pretending to be dead. This incident is referred to as the Drina River incident.

"In the Appeals Chamber's view, it is beyond doubt that the acts committed by Milan Lukic and the two other men amount to the crime of persecution: They killed the five Muslim men and committed inhumane acts against the two survivors with the

deliberate intent to discriminate on religious or political grounds. Furthermore, the Appeals Chamber concurs with the findings of the Trial Chamber that the Appellant participated in the Drina River incident ‘with full awareness that the intent of the Milan Lukic’s group was to persecute the local Muslim population of Visegrad through the commission of the underlying crimes.’ The only reason why the seven Muslim men were arrested and killed was because of their belonging to the Muslim population of Visegrad. The Appellant was aware of these facts and he willingly participated in the Drina River incident by pointing his gun at the victims and preventing them from fleeing. Even if it has not been established beyond reasonable doubt that he personally killed the five Muslim men, his support had a substantial effect upon the perpetration of the crimes on the bank of the Drina River. He was at that time fully aware that his participation assisted the commission of the crime of persecution by the principal perpetrators. The Appellant is therefore responsible for having aided and abetted the crime of persecution by way of murder of the five Muslim men and of inhumane acts against the two other Muslim men (Count 3).”

**(iv) detention of non-Serbs in the KP Dom prison complex
in Foca, Bosnia-Herzegovina**

Krnjelac; (Appeals Chamber), September 17, 2003, para. 186: “In this case, the Trial Chamber indicated that the ‘detention of non-Serbs in the KP Dom [prison complex], and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foca municipality.’ The Appeals Chamber holds that it may be inferred from this finding that the treatment meted out to the non-Serb detainees was the consequence of the aforementioned discriminatory policy[²²] at the root of their detention. Furthermore, the Appeals Chamber recalls the Trial Chamber’s findings in paragraph 47 of the Judgment:

The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. *They were not mistreated like the non-Serb detainees.* The quality and quantity of their food was somewhat better, sometimes including additional servings. *They were not beaten or otherwise abused,* they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees.

The Appeals Chamber observes that this finding shows that only the non-Serb detainees were, in actual fact, subject to beatings. It holds that the differences in the way that the Serb and non-Serb detainees were treated cannot reasonably be attributed to the random

²² A discriminatory policy is not a required element of crimes against humanity, although it may be helpful to infer discriminatory intent. See “no requirement of discriminatory policy,” Section (IV)(d)(viii)(4)(g), ICTY Digest.

posting of the guards. This finding therefore confirms the above presumption. Accordingly, the Appeals Chamber considers that the only reasonable finding that could be reached on the basis of the Trial Chamber's relevant findings of fact was that the beatings were inflicted upon the non-Serb detainees because of their political or religious affiliation and that, consequently, these unlawful acts were committed with the requisite discriminatory intent. The Appeals Chamber considers that, even if it were to be assumed that the blows inflicted upon the non-Serb detainees were meted out in order to punish them for violating the regulations, the decision to inflict such punishment arose out of a will to discriminate against them on religious or political grounds since punishment was only inflicted upon non-Serb detainees."

(5) application—persecution as a crime against humanity

(a) Srebrenica massacre and related crimes

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 619-621: "The Trial Chamber has found that the widespread and systematic attack against the Bosnian Muslim population in Srebrenica was carried out on the basis of the ethnic, national and religious affiliation of the population. The Trial Chamber recalls in this respect the announcement of General Mladic that 'the time has come for us to take revenge upon the Turks in this region.' It further notes that many [Army of the Republika Srpska] soldiers were cursing at the Bosnian Muslims and calling them names. [Army of the Republika Srpska] soldiers told refugees to leave the area calling it 'Serb country' and part of 'Greater Serbia.' When Bosnian Muslim prisoners arrived at detention centres they were forced to repeat pro-Serb texts including that 'this [area] is Serbia.' The Trial Chamber therefore finds that the circumstances accompanying the terrorising and the cruel and inhumane treatment of the Bosnian Muslim civilians, the subsequent forcible transfer of the women and children and the organised executions of the men substantiate the existence of a discriminatory intent on racial, religious or political grounds of the perpetrators."

"The Trial Chamber finds that there is sufficient evidence to establish beyond reasonable doubt that the murder, the cruel and inhumane treatment and the terrorising of the civilian population as described above constitute blatant denials of fundamental rights that had a severe impact on the victims and therefore amount to persecutions. However, in relation to the destruction of the personal belongings such as clothes and wallets, the Trial Chamber does not find that those personal belongings constituted indispensable assets to their owners. The Trial Chamber therefore does not find that the burning of those personal belongings had a severe enough impact on the victims to reach the threshold of equal gravity as the acts listed in Article 5 of the Statute."

"In summary the Trial Chamber finds that the murder, cruel and inhumane treatment, terrorising and forcible transfer of the Bosnian Muslim civilians constituted a persecutorial campaign against the Bosnian Muslim population."

Nikolic – Momir, (Trial Chamber), December 2, 2003, paras. 30-33: “[I]n the several days following this attack on Srebrenica, VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] forces captured, detained, summarily executed, and buried over 7000 Bosnian Muslim men and boys from the Srebrenica enclave, and forcibly transferred the Bosnian Muslim women and children of Srebrenica out of the enclave.’ These acts form the basis of the crime of persecutions to which Momir Nikolic has pled guilty.”

“The crime of persecutions . . . was carried out by the following means: (a) the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons; (b) the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potocari and in detention facilities in Bratunac and Zvornik; (c) the terrorising of Bosnian Muslim civilians in Srebrenica and Potocari; (d) the destruction of personal property and effects belonging to the Bosnian Muslims; and (e) the forcible transfer of Bosnian Muslims from the Srebrenica enclave.”

“Beginning on 12 and 13 July 1995 in Potocari, a number of Bosnian Muslim men and women were shot and killed in and around the area of the United Nations compound, where they had gathered after fleeing Srebrenica; one group of approximately 80 -100 men were summarily executed by decapitation. Within a five-day period, approximately 6,000 Bosnian Muslim men who were escaping in ‘the column’ from Srebrenica were captured, detained and executed in various locations in the Bratunac and Zvornik municipalities. In the town of Bratunac on 13 July 1995, some of the Bosnian Muslim men who were detained there were taken from their places of detention, including schools, hangars and buses, and summarily executed. Along the route between Bratunac and Zvornik, the names previously used to mark settlements and communities or places of learning, culture and work or geographic features are now used to identify mass execution sites: Jadar River, Cerska Valley, Kravica Warehouse, Petkovci School, Pilica Cultural Centre, and the villages of Tisca and Orahovac. At one location, Branjevo Military Farm, approximately 1,200 Bosnian Muslim men who had been captured from the column were executed by automatic weapon fire.”

“In his Statement of Facts, Momir Nikolic describes his role in the initial stages of planning the murder operation, including the detention of able-bodied men and the selection of execution sites:

In the morning of 12 July, prior to the above-mentioned meeting, I met with Lt. Colonel Vujadin Popovic, Chief of Security, Drina Corps, and Lt. Colonel Kosonic, Chief of Intelligence, Drina Corps, outside the Hotel Fontana. At that time Lt. Colonel Popovic told me that the thousands of Muslim women and children in Potocari would be transported out of Potocari toward Muslim-held territory near Kladanj and that the able-bodied Muslim men within the crowd of Muslim civilians would be separated from the crowd, detained temporarily in Bratunac, and killed shortly thereafter. I was told that it was my responsibility to

help coordinate and organise this operation. Lt. Colonel Kosoric reiterated this information and we discussed the appropriate locations to detain the Muslim men prior to their execution. I identified several specific areas: the Old Elementary School 'Vuk Karadzic' (including the gym), the old building of the secondary School 'Duro Pucar Stari,' and the Hangar (which is 50 meters away from the old secondary School). Lt. Colonel Popovic and Kosoric talked with me about sites of executions of temporarily detained Muslim men in Bratunac and we discussed two locations which were outside Bratunac town. These were: State company 'Ciglane' and a mine called 'Sase' in Sase."

(b) attack on Muslim residents of Glogova in the Municipality of Bratunac with the goal of taking over territory in Bosnia-Herzegovina

(i) underlying acts

Deronjic, (Trial Chamber), March 30, 2004, para. 128: "From the end of April to 9 May 1992, Miroslav Deronjic, individually as President of the Crisis Staff of the Municipality of Bratunac and in concert with other members of the joint criminal enterprise, committed Persecutions of Bosnian Muslims on political, racial or religious grounds, in the village of Glogova in the Municipality of Bratunac. These Persecutions resulted in the killings of 64 Bosnian Muslims, the forcible displacement of the Bosnian Muslim population from Glogova and the destruction of the village of Glogova."

(ii) intent

Deronjic, (Trial Chamber), March 30, 2004, paras. 129, 132: "Miroslav Deronjic committed the aforementioned acts with the specific intent to discriminate against the Bosnian Muslim residents of Glogova and the Municipality of Bratunac on political and religious grounds." "The decision to attack Glogova and to displace permanently its Muslim residents was taken in order to further the plan to create Serb ethnic territories within Bosnia and Herzegovina."

(iii) existence of a widespread or systematic attack against a civilian population and knowledge that the acts form part of that attack

Deronjic, (Trial Chamber), March 30, 2004, para. 130: "Miroslav Deronjic knew that the attack on Glogova and the forcible displacement of the Bosnian Muslim population formed part of a widespread and systematic attack directed against the Bosnian Muslim civilian population within parts of Bosnia and Herzegovina designated as the Republika Srpska."

(iv) armed conflict

Deronjić, (Trial Chamber), March 30, 2004, para. 131: “The attack on Glogova occurred within the context of an armed conflict between Serb and Muslim forces within Bosnia and Herzegovina.”

ix) other inhumane acts (Article 5(i))

(1) generally

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 117: “The Appeals Chamber notes that inhumane acts as crimes against humanity were deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”

See also *Kupreskić et al.*, (Trial Chamber), January 14, 2000, para. 563 (same language as quoted).

Galic, (Trial Chamber), December 5, 2003, para. 152: “The crime of inhumane acts is a residual clause for serious acts which are not otherwise enumerated in Article 5 but which require proof of the same chapeau elements.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 247: “Article 5(i) of the Statute (other inhumane acts) is a residual clause, which applies to acts that do not fall within any of other sub-clause [sic] of Article 5 of the Statute but are sufficiently similar in gravity to the other enumerated crimes. Inhumane acts are ‘[...] acts or omissions intended to cause deliberate mental or physical suffering to the individual.’ As constituting crimes against humanity, these acts must also be widespread or systematic.”

(2) part of international customary law

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 624: “Mindful of the principle *nullum crimen sine lege*, the Trial Chamber finds that the category of Other Inhumane Acts, as a residual category of crimes against humanity, forms part of customary international law. It should be stressed that other inhumane acts is in itself a crime under international criminal law. The Trial Chamber observes that convictions have been entered on this ground by the International Military Tribunal at Nuremberg, this Tribunal and the Rwanda Tribunal.”

(3) potential *nullum crimen sine lege* issue

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 117: “The Appeals Chamber considers that the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle. In the present case, however, ‘other inhumane acts’ are charged exclusively as injuries.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 625: “The crime of Other Inhumane Acts exists in order not to unduly restrict the Statute’s application with regard to crimes against humanity. It must be stressed, however, that the principle of legality requires that a trier of fact exercise great caution in finding that an alleged act, not regulated elsewhere in Article 5 of the Statute, forms part of this crime: norms of criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not.”

Stakić, (Trial Chamber), July 31, 2003, paras. 719-721: “The Trial Chamber recalls that ‘[t]he use of “other inhumane acts” as a crime against humanity under Article 5(f) of the Statute to attach criminal liability to forcible transfers, which are not otherwise punishable as deportations, raises serious concerns.’ While noting that ‘[n]ot every law can be defined with ultimate precision and that it is for the jurisprudence to interpret and apply legal provisions which need, in part, to be formulated in the abstract,’ the Trial Chamber declared that the description of a criminal offence extends beyond the permissible when the specific form of conduct prohibited can not be identified.’ The Trial Chamber therefore held that as ‘[t]he crime of “other inhumane acts” subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness’ it might violate the fundamental criminal law principle *nullum crimen sine lege certa*.”

“This legal issue was addressed in *Kupreskić*, where the Trial Chamber held that the category ‘other inhumane acts’ was:

deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.

After referring to several international human rights instruments such as the Universal Declaration of Human Rights of 1948 and the two United Nations Covenants of 1966, the *Kupreskić* Trial Chamber concluded that by referring to such instruments one would be able to identify ‘less broad parameters for the interpretation of “other inhumane acts”’ and ‘identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.’”

“This Trial Chamber disagrees with that approach and notes that the international human rights instruments referred to by the *Kupreskić* Trial Chamber

provide somewhat different formulations and definitions of human rights. However, regardless of the status of the enumerated instruments under customary international law, the rights contained therein do not necessarily amount to norms recognised by international criminal law. The Trial Chamber recalls the report of the Secretary-General according to which ‘the application of the principle *nullum crime sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law.’ Accordingly, this Trial Chamber hesitates to use such *human rights* instruments automatically as a basis for a norm of *criminal law*, such as the one set out in Article 5(i) of the Statute. Its hesitation is even more pronounced when, as in the present case, there is no need to undertake such an exercise. A norm of criminal law must always provide a Trial Chamber with an appropriate yardstick to gauge alleged criminal conduct for the purposes of Article 5(i) so that individuals will know what is permissible behaviour and what is not.”

(4) elements

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 117: “Inhumane acts as a crime against humanity is comprised of acts which fulfill the following conditions:

- the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- the suffering must be the result of an act or omission of the accused or his subordinate; and
- when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.”

See also *Kordić and Čerkez*, (Trial Chamber), February 26, 2001, para. 271 (same elements); *Blaskić*, (Trial Chamber), March 3, 2000, para. 243 (similar).

Vasiljević, (Appeals Chamber), February 25, 2004, para. 165: “In the present case, when recalling the applicable law . . . on inhumane acts, the Trial Chamber held that:

The elements to be proved [for an act to constitute an inhumane act as a crime against humanity] are:

- (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;
- (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack of [*sic*] human dignity;
- (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.”

See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 626 (same elements but using “intentionally” instead of “deliberately” in last prong of test); *Galic*, (Trial Chamber), December 5, 2003, para. 152 (same elements but using “intentionally” instead of “deliberately” in last prong of test); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 234 (same elements).

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 271: “In addition [to the elements of the crime], as discussed in relation to the requirements for the application of Article 5 of the Statute, the acts must have been committed as part of a widespread or systematic attack against a civilian population.”

(a) factors for assessing seriousness of the act

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 165: “To assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.” See also *Galic*, (Trial Chamber), December 5, 2003, para. 153 (similar); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 235 (same).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 627: “The element of ‘similar seriousness’ is to be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s).”

(b) no requirement that the suffering have long term effects

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 165: “While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 627: “There is no requirement that the effects on the victim(s) be long-lasting, however the fact that such were the effects will impact the determination of the seriousness of the act or omission.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 235: “[T]he fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 131: “The suffering inflicted by the act upon the victim does not need to be lasting so long as it real and serious.”

(c) *mens rea*

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 628: “It is required that the perpetrator, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or that the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act.”

Galic, (Trial Chamber), December 5, 2003, para. 154: “The intention to inflict inhumane acts is satisfied where the offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or where he knew that his or her act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 132: “The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.”
See also Vasiljevic, (Trial Chamber), November 29, 2002, para. 236 (similar).

(5) equivalent to “cruel treatment” under Article 3 and “inhumane treatment” under Article 5

Jelavic, (Trial Chamber), December 14, 1999, para. 52: “The sub-characterisation ‘other inhumane acts’ specified under Article 5(i) of the Statute is an generic charge which encompasses a series of crimes. [T]he notion of cruel treatment set out in Article 3 of the Statute ‘carries an equivalent meaning [. . .] as inhuman treatment does in relation to grave breaches of the Geneva Conventions.’ Likewise . . . the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning.”

See discussion of inhuman treatment under Article 2, Section (I)(d)(ii)(2), ICTY Digest; cruel treatment under Article 3, Section (II)(d)(iii), ICTY Digest; cruel and inhumane treatment as a form of persecution, Section (IV)(d)(viii)(3)(i), ICTY Digest.

(6) acts covered

(a) forcible displacement and forcible transfer

Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 629-630: “[T]he Trial Chamber is of the opinion that the prohibition against forcible population displacements, whether in international or non-international armed conflicts, forms part of customary international law. The Trial Chamber finds that the crime of forcible transfer as defined satisfies the three requirements above. This crime, therefore, clearly forms part of the category of Other Inhumane Acts under Article 5(i) of the Statute.” “Consequently, it is a crime against humanity to forcibly displace members of the civilian population unless any of the law’s exceptions applies justifying the displacement.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 544: “[D]isplacement within the boundaries of a State constitutes ‘forcible transfer,’ punishable as ‘other inhumane acts’ pursuant to Article 5(i) of the Statute.”

Krstić, (Trial Chamber), August 2, 2001, para. 523: “[F]orcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity.”

See also Stakić, (Trial Chamber), July 31, 2003, para. 723: “This Trial Chamber has used a definition of deportation that covers different forms of forcible transfers. The Prosecution has proposed that various forms of forcible transfer should be covered by Article 5(i) of the Statute. The Trial Chamber has concluded that the vast majority of these forms fall under the definition of deportation as laid down in Article 5(d).”

(i) distinction between deportation, forcible transfer and forced displacement

For discussion of the distinctions between deportation, forcible transfer and forcible displacement, see Section (IV)(d)(viii)(3)(e)(iii), ICTY Digest.

(ii) coercion required for both deportation and forcible transfer

Brđjanin, (Trial Chamber), September 1, 2004, para. 543: “It is essential for both ‘deportation’ [under Article 5(d)] and ‘forcible transfer’ [under Article 5(i)] that the displacement takes place under coercion. The essential element in establishing coercion is that the displacement be involuntary in nature, where the persons concerned had no real choice.”

(iii) displacement must be unlawful

Brđjanin, (Trial Chamber), September 1, 2004, para. 543: “In addition, the displacement must be unlawful.”

(iv) *mens rea*

Brđjanin, (Trial Chamber), September 1, 2004, para. 545: “With regard both to deportation and forcible transfer as crimes against humanity, the Prosecution needs to prove beyond reasonable doubt that the Accused acted with the intent that the removal of the person or persons be permanent.”

For discussion of “deportation, forcible transfer and forcible displacement,” underlying the crime of persecution, see Section (IV)(d)(viii)(3)(e), ICTY Digest.

(b) mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance

Kvočka et al., (Trial Chamber), November 2, 2001, para. 208: “Mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance are listed in the jurisprudence of the Tribunal as falling under this category [other inhumane acts].”

(c) serious physical and mental injury

Blaskić, (Trial Chamber), March 3, 2000, para. 239: “[S]erious physical and mental injury – excluding murder – is without doubt an ‘inhumane act’ within the meaning of Article 5 of the Statute.”

(d) removal of individuals to detention facilities excluded

Stakić, (Trial Chamber), July 31, 2003, para. 723: “In relation to other examples provided by the Prosecution (such as removal of individuals to detention facilities), the Trial Chamber is not convinced that they a) reached the same level as other listed crimes under Article 5 of the Statute, b) suffice to base a conviction cumulatively on Article 5(i), and c) in this case might amount to an infringement of the principle *nullum crime sine lege certa*.”

(e) application—other inhumane acts

(i) forcible transfer of women and children from Srebrenica to Kladanj

Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 631, 707: “[T]he Trial Chamber has found that the crime of forcible transfer, as a component crime of persecution, was committed.” “It has been proved beyond reasonable doubt that the women and children from the Srebrenica enclave were forcibly transferred to Kladanj on 12 and 13 July 1995.”

(ii) campaign of sniping, artillery fire and mortar attacks on civilians in Sarajevo

Galić, (Trial Chamber), December 5, 2003, para. 599: “The Trial Chamber is further satisfied that, as examined in this Part of the Judgement, . . . inhumane acts falling within the meaning of Article 5 of the Statute were committed in Sarajevo during the Indictment Period [from around 10 September 1992 to 10 August 1994].” For detailed factual findings, see *Galić*, (Trial Chamber), December 5, 2003, paras. 192-594. See also discussion of “campaign of sniping at, and shelling of, civilians in Sarajevo,” Section (II) (d) (xi) (12) (a), ICTY Digest.

V) INDIVIDUAL RESPONSIBILITY (ARTICLE 7(1))

a) Statute

ICTY Statute, Article 7(1):

“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

b) Generally

Jokić - Miodrag, (Trial Chamber), March 18, 2004, para. 56: “Individual criminal responsibility attaches to persons who, in the terms of Article 7(1) of the Statute, ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute.’”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 135: “Article 7(1) reflects the principle of criminal law that criminal liability does not attach solely to individuals who physically commit a crime but may also extend to those who participate

in and contribute to the commission of a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 367: “Article 7(1) is concerned with persons directly responsible for planning, instigating, ordering, committing, or aiding and abetting in the planning, preparation or execution of a crime. Thus, both the individual who himself carries out the unlawful conduct and his superior who is involved in the conduct not by physical participation, but for example by ordering or instigating it, are covered by Article 7(1). For instance, a superior who orders the killing of a civilian may be held responsible under Article 7(1), as might a political leader who plans that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander. The criminal responsibility of such superiors, either military or civilian, in these circumstances is personal or direct, as a result of their direct link to the physical commission of the crime. The criminal responsibility of a superior for such positive acts, except where the superior orders the crime in which case he may be more appropriately referred to as primarily responsible for its commission, may be regarded as ‘follow(ing) from general principles of accomplice liability.’”

For discussion of the difference between responsibility under Article 7(1) and responsibility under Article 7(3), see “distinguishing responsibility under Article 7(1) and Article 7(3),” Section (VI)(b)(vii), ICTY Digest.

For discussion of “pleading Article 7(1),” see Section (X)(b)(ix)(12), ICTY Digest.

c) Planning, instigating, ordering, committing

i) planning

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 386: “[P]lanning constitutes a discrete form of responsibility under Article 7(1) of the Statute, and . . . an accused may be held criminally responsible for planning alone.”

(1) *actus reus*

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 26: “The *actus reus* of ‘planning’ requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 513 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 513: “It has been said that ‘planning’ implies that one or several persons plan or design the commission of a crime

at both the preparatory and execution phases.” *Brđjanin*, (Trial Chamber), September 1, 2004, para. 268 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 443 (similar); *Krstić*, (Trial Chamber), August 2, 2001, para. 601 (similar); *Blaskić*, (Trial Chamber), March 3, 2000, para. 279 (same as *Brđjanin*).

Galić, (Trial Chamber), December 5, 2003, para. 168: “[P]lanning’ has been defined to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases, and the crime was actually committed within the framework of that design by others.”

(a) planning must substantially contribute to the crime

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 26: “It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 513 (same).

(b) person who committed crime may not also be held responsible for planning it

Brđjanin, (Trial Chamber), September 1, 2004, para. 268: “Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime. Involvement in the planning may however be considered an aggravating factor.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 443 (similar).

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 386: “[A] person found to have committed a crime will not be found responsible for planning the same crime.”

(c) circumstantial evidence may prove plan

Blaskić, (Trial Chamber), March 3, 2000, para. 279: “[C]ircumstantial evidence may provide sufficient proof of the existence of a plan.”

See also Galić, (Trial Chamber), December 5, 2003, para. 171: “Proof of all forms of criminal responsibility can be given by direct or circumstantial evidence.”

(2) *mens rea*

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 31: “[I]n relation to ‘planning,’ a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 513: “A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute for planning.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 268: For planning, “it needs to be established that the accused, directly or indirectly, intended the crime in question to be committed.”

ii) instigating

(1) *actus reus*

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 27: “The *actus reus* of ‘instigating’ means to prompt another person to commit an offence.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 514 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 269 (same language as quoted in *Limaj*).

Galic, (Trial Chamber), December 5, 2003, para. 168: “‘Instigating’ means prompting another to commit an offence, which is actually committed.” See *Krstić*, (Trial Chamber), August 2, 2001, para. 601 (same); *Blaskić*, (Trial Chamber), March 3, 2000, para. 280 (same).

(a) requires a clear/ substantial contribution to the conduct of the other person, but unnecessary to show that the crime would not have occurred without the accused’s involvement

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 27: “While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 514 (similar).

Brđjanin, (Trial Chamber), September 1, 2004, para. 269: “The *nexus* between instigation and perpetration requires proof. It is not necessary to demonstrate that the crime would not have been perpetrated without the accused’s involvement; it is sufficient to prove that the instigation was a factor clearly contributing to the conduct of other persons committing the crime in question.” (emphasis in original)

Galic, (Trial Chamber), December 5, 2003, para. 168: “It is sufficient to demonstrate that the instigation was ‘a clear contributing factor to the conduct of other person(s).’ It is not necessary to demonstrate that the crime would not have occurred without the accused’s involvement.” See also *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60 (similar, requires a “clear contribution”); *Kroocka et al.*, (Trial Chamber), November 2, 2001, para. 252 (similar).

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 387: “Although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (*i.e.*, that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused’s involvement.”

Blaskic, (Trial Chamber), March 3, 2000, paras. 278, 280: “In the case of instigating . . . proof is required of a causal connection between the instigation and the fulfilment of the *actus reus* of the crime.” “The ordinary meaning of instigating, namely, ‘bring about’ the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.”

(i) application of causal link

Brdjanin, (Trial Chamber), September 1, 2004, para. 359: “Many of the decisions of the . . . Crisis Staff of the [Autonomous Region of Krajina] for which the Accused bears responsibility requested that certain acts amounting to crimes be carried out. Most of the decisions did not take immediate effect and required implementation by, *e.g.*, municipal organs. In this context, it is immaterial whether the physical perpetrators were subordinate to the instigator, or whether a number of other persons would necessarily have to be involved before the crime was actually committed, as long as it can be shown that there was a causal link between an act of instigation and the commission of a particular crime. Causality needs to be established between all acts of instigation and the acts committed by the physical perpetrators, even where the former are the public utterances of the Accused.”

(b) both positive acts and omissions may constitute instigating, as well as express and implied conduct

Limaq et al., (Trial Chamber), November 30, 2005, para. 514: “Both acts and omissions may constitute instigating, which covers express and implied conduct.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 269 (same); *Blaskic*, (Trial Chamber), March 3, 2000, para. 280 (similar).

Galic, (Trial Chamber), December 5, 2003, para. 168: “It has been held in relation to ‘instigating’ that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 387: “Both positive acts and omissions may constitute instigation. . . .”

(2) *mens rea*

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 32: “With respect to ‘instigating,’ a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 514: “The requisite *mens rea* for ‘instigating’ is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 269: For instigation, “[i]t has . . . to be demonstrated that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.” See also *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 60 (same test); *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 252 (same test).

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 387: “[I]t must be proved that the accused directly intended to provoke the commission of the crime.”

(3) application—instigating

Brđjanin, (Trial Chamber), September 1, 2004, para. 360: “The Trial Chamber has found that decisions of the [Autonomous Region of Krajina] Crisis Staff regarding the disarmament, dismissal and resettlement of non-Serbs [from the Autonomous Region of Krajina] were systematically implemented by the municipal Crisis Staffs, the local police, and the military. Moreover, it has been abundantly proved that the Accused made several inflammatory and discriminatory statements, *inter alia*, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory of the [Autonomous Region of Krajina]. In light of the various

positions of authority held by the Accused throughout the relevant time, these statements could only be understood by the physical perpetrators as a direct invitation and a prompting to commit crimes. Against this background, the Trial Chamber is satisfied that the Accused instigated the commission of some crimes charged in the Indictment [namely, deportations from the Autonomous Region of Krajina to Karlovac and forcible transfer from the Autonomous Region of Krajina to Travnik, and the crime of persecution].”

iii) ordering

(1) *actus reus*

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 28: “The *actus reus* of ‘ordering’ means that a person in a position of authority instructs another person to commit an offence.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 515 (same); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 270 (similar).

Galic, (Trial Chamber), December 5, 2003, para. 168: “‘Ordering’ means a person in a position of authority using that authority to instruct another to commit an offence.”

Stakić, (Trial Chamber), July 31, 2003, para. 445: “The Trial Chamber considers ‘ordering’ to refer to ‘a person in a position of authority using that position to convince another to commit an offence.’” See also *Krstić*, (Trial Chamber), August 2, 2001, para. 601 (similar).

(a) no formal superior-subordinate relationship required, so long as the accused possessed *de jure* or *de facto* authority to order, or that authority may be implied

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 28: “A formal superior-subordinate relationship between the accused and the perpetrator is not required.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 331 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 515: “It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator; it is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 270 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 331: “This form of liability requires that at the time of the offence, an accused possessed the authority to issue binding orders to

the alleged perpetrator.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 388: “[N]o formal superior-subordinate relationship is required for a finding of ‘ordering’ so long as it is demonstrated that the accused possessed the authority to order.”

(b) order need not be given directly to person who performs the offense

Strugar, (Trial Chamber), January 31, 2005, para. 331: The order need not be given “directly to the individual executing it.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 270 (similar).

Blaskic, (Trial Chamber), March 3, 2000, para. 282: “[A]n order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence.”

(c) order need not be in writing or in any particular form

Limaj et al., (Trial Chamber), November 30, 2005, para. 515: “There is no requirement that the order be given in writing, or in any particular form. . . .” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 331; *Blaskic*, (Trial Chamber), March 3, 2000, para. 281 (similar).

Brdjanin, (Trial Chamber), September 1, 2004, para. 270: “The order does not need to be given in any particular form. . . .” *See also Galic*, (Trial Chamber), December 5, 2003, para. 168 (same).

(d) order may be proven through circumstantial evidence

Limaj et al., (Trial Chamber), November 30, 2005, para. 515: “[T]he existence of the order may be proven through circumstantial evidence.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 331 (similar); *Blaskic*, (Trial Chamber), March 3, 2000, para. 281 (similar).

(e) order may be explicit or implicit

Blaskic, (Trial Chamber), March 3, 2000, para. 281: The order “can be explicit or implicit.”

(f) factors from which to infer ordering

Galic, (Trial Chamber), December 5, 2003, para. 171: “[O]rdering? . . . may be inferred from a variety of factors, such as the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops,

the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of operations, the *modus operandi* of similar acts, the officers and staff involved, the location of the superior at the time and the knowledge of that officer of criminal acts committed under his command.”

**(g) causal link between ordering and perpetration of a crime
needed**

Strugar, (Trial Chamber), January 31, 2005, para. 332: “As this form of liability is closely associated with ‘instigating,’ subject to the additional requirement that the person ordering the commission of a crime have authority over the person physically perpetrating the offence, a causal link between the act of ordering and the physical perpetration of a crime, analogous to that which is required for instigating, also needs to be demonstrated as part of the *actus reus* of ordering. The Chamber further accepts that, similar to instigating, this link need not be such as to show that the offence would not have been perpetrated in the absence of the order.”

**(h) conviction for ordering not appropriate where the accused
committed the same crime**

Stakić, (Trial Chamber), July 31, 2003, para. 445: “The Trial Chamber considers . . . that an additional conviction for ordering a particular crime is not appropriate where the accused is found to have committed the same crime.”

(i) whether ordering may be based on an omission

Galic, (Trial Chamber), Separate and Partially Dissenting Opinion of Judge Nieto-Navia, December 5, 2003, para. 119: “[W]hen examining the jurisprudence of the Tribunal relevant to the elements of the various heads of individual criminal responsibility under Article 7(1), the Majority had explained that the act of ordering refers ‘to a person in a position of authority using that authority to instruct another to commit an offence.’ It had then explained that where a superior ‘under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by . . . culpable omissions, directly participated in the commission of crimes through one or more of the modes of participation described in Article 7(1).’ Such an interpretation of Article 7(1) then does not exclude the possibility that a superior may be deemed to have ‘ordered’ a subordinate to commit a crime by ‘culpable omission.’ This latter notion, though understated, exerts on the Majority’s conclusion concerning the Accused’s criminal responsibility a perceptible influence which can be felt throughout its prose. For example, the Majority argues that

[t]he evidence is compelling that *failure to act* for a period of approximately twenty-three months by a corps commander who has substantial knowledge of crimes committed against civilians by his subordinates and is reminded on a

regular basis of his duty to act upon that knowledge *bespeaks of a deliberate intent to inflict acts of violence on civilians*.

In another instance, the Majority argues in the very paragraph where it concludes that the Accused ordered the crimes proven at trial that

the evidence impels the conclusion that General Galic, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) *failed to prevent the commission of a crime* and punish the perpetrators thereof upon that knowledge, *furthered* a campaign of unlawful acts of violence against civilians ... and ... *intended to conduct* that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo.

According to the Majority therefore, the Accused's 'failure to act' or 'failure to prevent the commission of a crime' during the Indictment Period [from around September 10, 1992 to August 1994] contributes to the conclusion that he ordered the commission of the crimes proven at trial. I fail to understand though how the Accused may be found responsible for ordering the commission of a crime on the basis of his failure to act or of an omission, be it a 'culpable one.'" (emphasis in *Galic*)

For findings by the Majority of the Appeals Chamber that General Galic also made affirmative orders, see *Galic*, (Trial Chamber), December 5, 2003, paras. 733-749.

(2) *mens rea*

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 30: "[T]he Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime." See also *Blaskic* (Appeals Chamber), July 29, 2004, para. 166 (similar).

Blaskic, (Appeals Chamber), July 29, 2004, paras. 41-42: "Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always

a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.”

“The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 515: “With regard to the *mens rea*, the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 333 (similar).

Brđjanin, (Trial Chamber), September 1, 2004, para. 270: “The person ordering must have the required *mens rea* for the crime with which he or she is charged and he or she must also have been aware of the substantial likelihood that the crime committed would be the consequence of the execution or implementation of the order.” See also *Stakić*, (Trial Chamber), July 31, 2003, para. 445 (similar).

See also *Blaskić*, (Trial Chamber), March 3, 2000, para. 282: “[W]hat is important is the commander’s *mens rea*, not that of the subordinate executing the order.”

See also *Blaskić*, (Appeals Chamber), July 29, 2004, paras. 34–42 (examining *mens rea* in common and civil law jurisdictions, as applied by the Trial Chamber).

(a) *mens rea* may be inferred

Vasiljević, (Appeals Chamber), February 25, 2004, para. 120: “The Appeals Chamber agrees with the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.”

Strugar, (Trial Chamber), January 31, 2005, para. 333: “The *mens rea* of the accused [for ordering] need not be explicit, it may be inferred from the circumstances. Indeed, as *mens rea* is a state of mind, its proof is typically a matter of inference. The standard of proof dictates, of course, that it be the only reasonable inference from the evidence.”

See also *Galić*, (Trial Chamber), December 5, 2003, para. 171: “Proof of all forms of criminal responsibility can be given by direct or circumstantial evidence.”

(3) application—ordering

(a) trench digging in the municipalities of Kiseljak, Busovaca and Vitez

Blaskic, (Appeals Chamber), July 29, 2004, paras. 596-597: “[T]he Appellant himself admits having ordered work platoons to dig trenches, but submits that these orders were not unlawful. If the Appeals Chamber concludes that the Appellant’s orders to use detainees to dig trenches either caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity, then it will have established that these orders of the Appellant were such as to satisfy the definition of cruel treatment.”

“The Appeals Chamber has noted that the use of forced labour is not always unlawful. Nevertheless, the treatment of non-combatant detainees may be considered cruel where, together with the other requisite elements, that treatment causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The Appeals Chamber notes that Geneva Conventions III and IV require that when non-combatants are used for forced labour, their labour may not be connected with war operations or have a military character or purpose. The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment. The Appeals Chamber accordingly finds that a reasonable trier of fact could have come to the conclusion that the Appellant has violated the laws or customs of war under Article 3 of the Statute, and common Article 3(1)(a) of the Geneva Conventions, and is guilty under Count 16 for ordering the use of detainees to dig trenches.”

For findings that Blaskic was not guilty regarding ordering trench digging with an awareness of a substantial likelihood that crimes would be committed by his subordinates, see *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 598-604. For additional crimes as to which Blaskic’s convictions for ordering were reversed, see *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 459-466 (July 18, 1993 attack on Stari Vitez); paras. 471-481 (crimes committed in April and September 1993 in Donja Veceriska, Gacice, and Grbavica); paras. 543-557 (April 1993 attacks in Kiseljak); para. 571 (June 1993 campaign in Kiseljak); paras. 658-660 (the use of “human shields”); paras. 346-348 (crimes committed in the Ahmici area on 16 April 1993); paras. 443, 444 (the April 16, 1993 attack in Vitez Municipality); paras. 518, 521, 523 (crimes in April 1993 in Loncari and Ocehnici); paras. 574, 582 (detentions during the conflict in the Lasva Valley region of Central Bosnia and in Vitez).

**(b) campaign of sniping and shelling attacks against civilians
in Sarajevo**

Galic, (Trial Chamber), December 5, 2003, paras. 733, 741, 745-747, 749: "The Majority has already found from the evidence of the frequency, intensity and geographical spread of the sniping and shelling attacks against civilians that there was a 'campaign' of sniping and shelling attacks against civilians in Sarajevo during the Indictment Period [from around September 10, 1992 to August 1994] by the [Sarajevo Romanija Corps] forces. The Trial Record is replete with evidence from a number of military and international personnel who testified to a pattern of sniping and shelling against civilians and concluded, in particular from the reduction of fire after cease-fire agreements or after complaints were lodged, that the sniping and shelling of civilians was maintained by the Bosnian Serb chain of command."

"[T]he Majority . . . has found that crimes were committed against civilians in a widespread fashion and over a long period of time by [Sarajevo Romanija Corps] troops. The Majority has already noted above that the manner of commission of these crimes reveals a striking similarity of pattern throughout. All this has led the Majority to draw the conclusion that the criminal acts were not sporadic acts of soldiers out of control but were carried out pursuant to a deliberate campaign of attacking civilians, which must have emanated from a higher authority or at least had its approval."

"An evaluation of the Trial Record makes it also abundantly clear that although General Galic called occasionally for decrease of fire against the civilian population of Sarajevo, when prompted by outside action, he also, at other times, intended to target, by direct or indiscriminate fire, civilians and the civilian population in the city of Sarajevo to spread terror within the civilian population of Sarajevo."

"The Majority is convinced that General Galic promoted the goals of his superiors for Sarajevo by implementing and furthering a campaign of sniping and shelling against the civilian population of Sarajevo, and that by relaying orders down the [Sarajevo Romanija Corps]'s chain of command to conduct that campaign in a manner that reveals a primary purpose to spread terror, sanctioning thereby the use of [Sarajevo Romanija Corps]'s personnel and equipment to an unlawful purpose, he intended that crimes against civilians be committed or to be committed by forces under his command."

"In finding that General Galic conducted, by upholding orders down the [Sarajevo Romanija Corps] chain of command, the campaign of sniping and shelling against the civilian population of Sarajevo with the intent to spread terror among that population, the Majority recalls that it does not find that General Galic was the unique architect of that campaign."

"In sum, the evidence impels the conclusion that General Galic, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) failed to prevent the commission of crime and punish the perpetrators thereof upon that knowledge,

furthered a campaign of unlawful acts of violence against civilians through orders relayed down the [Sarajevo Romanija Corps] chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo. The Majority finds that General Galic is guilty of having ordered the crimes proved at trial.”³³

But see Galic, (Trial Chamber), Separate and Partially Dissenting Opinion of Judge Nieto-Navia, December 5, 2003, paras. 116, 120: “The Majority concludes that the Accused ordered his forces to attack civilians in Sarajevo deliberately, thereby finding him criminally responsible under Article 7(1) of the Statute. This conclusion rests entirely on inferences, since no witness testified to hearing the Accused issue such orders and no written orders were tendered which would indicate that he so instructed his troops. The evidence, in fact, explicitly supports a conclusion that the Accused did not order such attacks. For example, he personally instructed his troops in writing to respect the Geneva Conventions and other instruments of international humanitarian law. This written evidence echoes the testimonies of 16 [Sarajevo Romanija Corps] soldiers and officers posted throughout Sarajevo during the Indictment Period [from around September 10, 1992 to August 1994], who confirmed that they had received orders not to target civilians. Furthermore, the Accused launched internal investigations on at least two occasions when alerted by UN representatives about possible attacks on civilians by his forces. I conclude therefore that the Trial Record does not support a finding that the Accused issued orders to attack civilians in Sarajevo deliberately and dissent from the Majority’s conclusion that he incurs criminal responsibility under Article 7(1) of the Statute.” “I . . . conclude that the Accused is guilty of the crimes of unlawful attacks against civilians, murder and inhumane acts under Article 7(3) of the Statute.”

As to whether Galic was responsible for the crime of “ordering” by omission under Article 7(1), see “whether ordering may be based on an omission,” Section (V)(c)(iii)(1)(i), ICTY Digest.

(c) Old Town of Dubrovnik and Srd

For the finding that the accused was not responsible for ordering the attack by the JNA [Yugoslav Peoples’ Army] on the Old Town of Dubrovnik on 6 December 1991, see *Strugar*, (Trial Chamber), January 31, 2005, paras. 338, 346-348.

³³ By referring to the fact that Galic “failed to prevent the commission of crime and punish the perpetrators thereof,” the Trial Chamber is most likely looking to whether the troops were under Galic’s effective control. See discussion of “effective control measured by the ability to prevent and/or punish the crimes,” Section (VI)(c)(i)(3), ICTY Digest.

iv) committing

(1) generally

Limaj et al., (Trial Chamber), November 30, 2005, para. 509: “Committing’ a crime ‘covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law.’ The Appeals Chamber has held that Article 7(1) ‘covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.”

Galic, (Trial Chamber), December 5, 2003, para. 168: “Committing’ means that an ‘accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal’s Statute.’ Thus, it ‘covers first and foremost the physical perpetration of a crime by the offender himself.”

Stakić, (Trial Chamber), July 31, 2003, para. 439: “The Trial Chamber prefers to define ‘committing’ as meaning that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others.”

Krstić, (Trial Chamber), August 2, 2001, para. 601: “Committing’ covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”

(2) joint criminal enterprise is a form of commission, although commission is broader than joint criminal enterprise

For cases that participation in a joint criminal enterprise is a form of commission under Article 7(1) of the Statute, see “joint criminal enterprise is a form of ‘commission,’” Section (V)(e)(i)(3), ICTY Digest.

See also Stakić, (Trial Chamber), July 31, 2003, paras. 438, 528: “The Trial Chamber emphasizes that joint criminal enterprise is only one of several possible interpretations of the term ‘commission’ under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to ‘commission’ in its traditional sense should be given priority before considering responsibility under the judicial term ‘joint criminal enterprise.”’ “‘Commission,’ as a mode of liability, is broadly accepted, and joint criminal enterprise provides one definition of ‘commission.”’

For discussion of the common purpose/joint criminal enterprise doctrine, see Section (V)(e), ICTY Digest.

For discussion of “whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability,” see (V)(c)(viii), ICTY Digest.

(3) *actus reus*

(a) involves direct personal or physical participation or a culpable omission

Limaj et al., (Trial Chamber), November 30, 2005, para. 509: “The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in the Statute, through positive acts or omissions, whether individually or jointly with others.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 251 (same).

Limaj et al., (Trial Chamber), November 30, 2005, para. 509: Committing may be “through positive acts or omissions.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 251 (same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 694: “It is commonly understood that individual criminal responsibility will attach for ‘committing’ a crime where it is established that the accused himself physically perpetrated the criminal act or personally omitted to act when required to do so under law.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 137: “The meaning to be attached to ‘committed,’ the highest degree of participation in a crime, is not controversial. Any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with the requisite knowledge. An accused person will be held criminally responsible if he actually carries out the *actus reus* of the enumerated crimes.”

Vasiljević, (Trial Chamber), November 29, 2002, para. 62: “The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where it is proved that he personally physically perpetrated the criminal act in question or personally omitted to do something in violation of international humanitarian law.”

Kordić and Čerkez, (Trial Chamber), February 26, 2001, para. 376: “[A]ny finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the International Tribunal’s Statute with the requisite knowledge.”

Kunarac, Kovac, and Vuković, (Trial Chamber), February 22, 2001, para. 390: “An individual can be said to have ‘committed’ a crime when he or she physically perpetrates

the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.”

(b) there may be several perpetrators of the same crime

Limaj et al., (Trial Chamber), November 30, 2005, para. 509: Committing may be done “individually or jointly with others.” See also *Krocka et al.*, (Trial Chamber), November 2, 2001, para. 251 (same).

Stakić, (Trial Chamber), July 31, 2003, para. 528: “[A]s stated in the *Kunarac* Trial Judgement, a crime can be committed individually or jointly with others, that is, “[t]here can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.” See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 137 (same language as quoted); *Kunarac, Kovac, and Vuković*, (Trial Chamber), February 22, 2001, para. 390 (source of quoted language).

(c) the accused need not participate in all aspects of the crime

Stakić, (Trial Chamber), July 31, 2003, para. 439: “The accused himself need not have participated in all aspects of the alleged criminal conduct.”

(4) *mens rea*

Limaj et al., (Trial Chamber), November 30, 2005, para. 509: “The requisite *mens rea* [for committing] is that the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 137: “The requisite *mens rea* [for committing a crime] is that the accused intended that a criminal offence occur as a consequence of his conduct.”

Krocka et al., (Trial Chamber), November 2, 2001, para. 251: “The requisite *mens rea* [for committing a crime] is that, as in other forms of criminal participation under Article 7(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.”

For analysis of the *mens rea* for the common purpose/joint criminal enterprise doctrine (which is a form of “committing”), see (V)(e)(iv), ICTY Digest.

v) planning, instigating, ordering and committing—*mens rea* generally

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 29, 112: “The *mens rea*

for these modes of responsibility [planning, instigating, and ordering] is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering.”

“[T]he Appeals Chamber considers that a person who orders, plans or instigates an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, plan or instigation, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering, planning or instigating. Ordering, planning or instigating with such awareness has to be regarded as accepting that crime.”

Galic, (Trial Chamber), December 5, 2003, para. 172: “In order for individual criminal responsibility to ensue, conduct must be coupled with intent. The requisite *mens rea* for all forms of participation under Article 7(1) is that the accused ‘acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.’ The *mens rea* of the accused need not be explicit but may be inferred from the circumstances.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 386: “[A]n accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed.”

Blaskic, (Trial Chamber), March 3, 2000, para. 278: “[P]roof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed. [I]n general, a person other than the person who planned, instigated or ordered is the one who perpetrated the *actus reus* of the offence.”

vi) acts under Article 7(1) may be done through a positive act or culpable omission

Blaskic, (Appeals Chamber), July 29, 2004, para. 663: “Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility). There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one’s subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.”

Galic, (Trial Chamber), December 5, 2003, paras. 168, 170: “[P]lanning, instigating, ordering, committing, and aiding and abetting” may be performed through positive acts or through culpable omission.”

“In situations where a person in authority under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by positive acts or culpable omissions, directly participated in the commission of the crimes through one or more of the modes of participation described in Article 7(1).”

For discussion of omissions as a form of instigating, see Section (V)(c)(ii)(1)(b), ICTY Digest. For omissions as a form of committing see Section (V)(c)(iv)(3)(a), ICTY Digest. For omissions as a form of aiding and abetting see Section (V)(d)(iv)(2), ICTY Digest.

But see “whether ordering may be based on an omission,” Section (V)(c)(iii)(1)(i), ICTY Digest.

For a comparison of responsibility under Article 7(1) and responsibility under Article 7(3), see “distinguishing responsibility under Article 7(1) and Article 7(3),” Section (VI)(b)(vii), ICTY Digest.

(1) application—use of human shields as omission

For findings that Blaskic was guilty under Article 7(1) for the inhuman treatment of detainees who were used as human shields, due to his failure to prevent their use as such despite duties imposed upon him by the laws or customs of war to care for protected persons put in danger, see *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 666, 668-670.

d) Aiding and abetting

i) generally

Kumarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 391: “As opposed to the ‘commission’ of a crime, aiding and abetting is a form of accessory liability.”

ii) based on customary international law

Tadic, Case No. IT-94-1 (Trial Chamber), May 7, 1997, para. 666: “The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act . . . has a basis in customary international law.”

iii) defined

Blaskić, (Appeals Chamber), July 29, 2004, para. 45: “In *Vasiljević*, the Appeals Chamber set out the *actus reus* and *mens rea* of aiding and abetting. It stated:

- (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. [...]
- (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. [...]

The Appeals Chamber considers that there are no reasons to depart from this definition.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 516: “‘Aiding and abetting’ has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.” *See also Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 161 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 349: “Aiding and abetting has been defined in the case-law of the Tribunal as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime, before, during or after the commission of the crime, and irrespective of whether these acts took place at a location other than that of the principal crime.”

Galić, (Trial Chamber), December 5, 2003, para. 168: “‘Aiding and abetting’ means rendering a substantial contribution to the commission of a crime.” *See also Krstić*, (Trial Chamber), August 2, 2001, para. 601 (same).

Tadić, (Trial Chamber), May 7, 1997, para. 689: “[A]iding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present.”

(1) difference between aiding and abetting

Limaj et al., (Trial Chamber), November 30, 2005, para. 516: “Strictly, ‘aiding’ and ‘abetting’ are not synonymous. ‘Aiding’ involves the provision of assistance; ‘abetting’ need involve no more than encouraging, or being sympathetic to, the commission of a particular act. These forms of liability have, however, been consistently considered together in the jurisprudence of the Tribunal.”

Kronka et al., (Trial Chamber), November 2, 2001, para. 254: “[A]iding and abetting, ‘which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto.’”

iv) *actus reus*

(1) requires practical assistance, encouragement or moral support

Blaskic, (Appeals Chamber), July 29, 2004, paras. 46: “In this case, the Trial Chamber, following the standard set out in *Furundzija*, held that the *actus reus* of aiding and abetting ‘consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.’ . . . The Appeals Chamber considers that the Trial Chamber was correct in so holding.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 517 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 726 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 271 (similar); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 70 (similar); *Furundzija*, (Trial Chamber), December 10, 1998, paras. 235, 249 (similar).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 162: “The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.”

(2) may occur through an omission

Blaskic, (Appeals Chamber), July 29, 2004, para. 47: “The Trial Chamber . . . stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, ‘provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*.’ It considered:

In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 517: “An omission may, in the particular circumstances of a case, constitute the *actus reus* of aiding and abetting.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 726 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 271 (similar); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 70 (same as *Brdjanin*).

Strugar, (Trial Chamber), January 31, 2005, para. 349: “The *Blaskić* Appeals Judgement left open the possibility that in the circumstances of a given case an omission may constitute the *actus reus* of aiding and abetting. Trial Chambers have held that this is the case, for example, if a person with superior authority is present at the crime scene, provided that his presence had a significant encouraging effect on the principal offender, or if there was an explicit duty to act.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 162: “The *actus reus* of aiding and abetting may be perpetrated through an omission, based on a duty to act, provided that the failure to act had a substantial effect on the commission of the crime and that it was coupled with the requisite *mens rea*.” See also *Blaskić*, (Trial Chamber), March 3, 2000, para. 284 (similar but states that the failure to act must have a “decisive effect” on the commission of the crime).

(3) cause-effect relationship not required, but must have a substantial effect on the commission of the crime

Blaskić, (Appeals Chamber), July 29, 2004, para. 48: “The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 517 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 349: “It is not necessary to establish a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or that such conduct served as a *conditio sine qua non* to the commission of the crime. However, the acts of the aider and abettor must have ‘a direct and substantial effect on the commission of the illegal act.’” See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 162 (similar to first sentence of *Strugar*).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 726: “The assistance need not have caused the act of the principal, but it must have had a ‘substantial effect’ on the commission of the crime.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 271 (similar); *Vasićević*, (Trial Chamber), November 29, 2002, para. 70 (similar).

Blaskić, (Trial Chamber), March 3, 2000, para. 285: “Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required.”

Furundžija, (Trial Chamber), December 10, 1998, para. 234: “The position under customary international law seems . . . to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime.”

Tadić, (Trial Chamber), May 7, 1997, para. 691: “[T]he acts of the accused must be direct and substantial.”

(4) assistance may occur before, during or after the act is committed

Blaskić, (Appeals Chamber), July 29, 2004, para. 48: The Appeals Chamber “further agrees that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated. . . .”

Limaj et al., (Trial Chamber), November 30, 2005, para. 517: “[T]he assistance may occur before, during or after the principal crime has been perpetrated.” See *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 726 (same); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 271 (same); *Vasićević*, (Trial Chamber), November 29, 2002, para. 70 (same).

Strugar, (Trial Chamber), January 31, 2005, para. 349: Aiding and abetting may occur “before, during or after the commission of the crime. . . .” See also *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 162 (same); *Blaskić*, (Trial Chamber), March 3, 2000, para. 285 (same).

Aleksovski, (Trial Chamber), June 25, 1999, para. 62: “Participation may occur before, during or after the act is committed. It can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed, that is, behaviour which may in fact clearly constitute instigation or abetment of the perpetrators of the crime.”

(5) actual physical presence not required

Blaskić, (Appeals Chamber), July 29, 2004, para. 48: “[T]he location at which the *actus reus* takes place may be removed from the location of the principal crime.”

Strugar, (Trial Chamber), January 31, 2005, para. 349: Aiding and abetting may occur “irrespective of whether the[] acts took place at a location other than that of the principal crime.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 162: “Participation may . . . be geographically separated [from the principal crime].” *Blaskić*, (Trial Chamber), March 3, 2000, para. 285 (same).

Tadić, (Trial Chamber), May 7, 1997, para. 691: “[A]ctual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be ‘concerned with the killing.’”

(6) the aider and abettor will be responsible for all that naturally results from his act

Tadić, (Trial Chamber), May 7, 1997, para. 692: The aider and abettor “will . . . be responsible for all that naturally results from the commission of the act in question.”

See, e.g., Kvočka et al., (Trial Chamber), November 2, 2001, para. 262: “The aider or abettor of persecution will . . . be held responsible for discriminatory acts committed by others that were a reasonably foreseeable consequence of their assistance or encouragement.”

(7) presence at scene

(a) not aiding and abetting unless it bestows legitimacy on, or provides encouragement to, perpetrator/ has a significant encouraging effect

Limaj et al., (Trial Chamber), November 30, 2005, para. 517: “While each case turns on its own facts, mere presence at the scene of a crime will not usually constitute aiding or abetting. However, where the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, that may be sufficient.”

Vasiljević, (Trial Chamber), November 29, 2002, para. 70: “Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.” *See also* *Kimarac, Kovac, and Vuković*, (Trial Chamber), February 22, 2001, para. 393 (requiring “a significant legitimising or encouraging effect”).

Aleksovski, (Trial Chamber), June 25, 1999, para. 64: “Mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*.”

Tadić, (Trial Chamber), May 7, 1997, para. 689: “[P]resence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.”

(b) example of encouraging effect

Tadić, (Trial Chamber), May 7, 1997, para. 690: “[W]hen an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.”

(c) presence of superior may, in some circumstances, be interpreted as approval of conduct

Limaj et al., (Trial Chamber), November 30, 2005, para. 517: “In a particular case encouragement may be established by an evident sympathetic or approving attitude to the commission of the relevant act. For example, the presence of a superior may operate as an encouragement or support, in the relevant sense.”

Strugar, (Trial Chamber), January 31, 2005, para. 349: The *actus reus* of aiding and abetting may be satisfied “if a person with superior authority is present at the crime scene, provided that his presence had a significant encouraging effect on the principal offender, or if there was an explicit duty to act.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 271: “An individual’s position of superior authority does not suffice to conclude from his mere presence at the scene of the crime that he encouraged or supported the crime. However, the presence of a superior can be perceived as an important *indicium* of encouragement or support.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 165: “Whether mere physical presence of an accomplice at the scene of the offence may constitute adequate encouragement or support for a finding of ‘aiding and abetting’ has been discussed in the Tribunal’s jurisprudence. Trial Chambers have held that presence, when combined with authority, can constitute assistance in the form of moral support, including tacit approval, that is, the *actus reus* of the offence. However, an individual’s presence and position of authority alone are not conclusive of aiding and abetting unless it is shown to have a significant legitimising or encouraging effect on the principal. It is necessary to consider the relevant facts to assess the impact of the accused’s presence at the scene to determine whether it had a substantial effect on the perpetration of the crime. The

presence of a superior may, however, be perceived as an important *indiciu* of encouragement and support.”

Blaskic, (Trial Chamber), March 3, 2000, para. 284: “[T]he mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.”

Aleksovski, (Trial Chamber), June 25, 1999, para. 65: “[A]n individual’s position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime. [T]he presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some circumstances, be interpreted as approval of that conduct. . . . An individual’s authority must therefore be considered to be an important indicium as establishing that his mere presence constitutes an act of intentional participation under Article 7(1). Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances.”

(8) aider and abettor may be convicted where principal offender has not been tried or identified, but acts of principal offender must be established

Krstic, (Appeals Chamber), April 19, 2004, para. 143: “A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified. In *Vasiljevic*, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 271 (similar to first sentence).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 726: “The criminal act of the principal for which the aider and abettor is responsible must be established.” *See also Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 161 (similar).

(9) no proof of a plan or agreement is required

Tadic, (Appeals Chamber), July 15, 1999, para. 229: “In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required. . . .”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 162: “No proof of a plan or agreement is required [for aiding and abetting].”

(10) principal need not be aware of accomplice's contribution

Tadić, (Appeals Chamber), July 15, 1999, para. 229: "In the case of aiding and abetting . . . the principal may not even know about the accomplice's contribution." *See also Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 161 (similar).

v) *mens rea*

(1) must have knowledge that acts will assist principal perpetrator's crime

Blaskić, (Appeals Chamber), July 29, 2004, para. 45: "In *Vasiljević*, the Appeals Chamber set out the . . . *mens rea* of aiding and abetting. It stated: . . . In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. . . ." *See also Vasiljević*, (Appeals Chamber), February 25, 2004, para. 102 (same).

Blaskić, (Appeals Chamber), July 29, 2004, para. 49: "In relation to the *mens rea* of an aider and abettor, the [Blaskić] Trial Chamber held that 'in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.' However, as previously stated in the *Vasiljević* Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation. In this respect, the Trial Chamber erred."

Limaj et al., (Trial Chamber), November 30, 2005, para. 518: "The *mens rea* required is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence."

Strugar, (Trial Chamber), January 31, 2005, para. 350: "Regarding the requisite *mens rea*, it must be established that the aider and abettor was aware that his acts were assisting in the commission of the crime by the principal. This awareness need not have been explicitly expressed, but it may be inferred from all relevant circumstances."

Brđjanin, (Trial Chamber), September 1, 2004, para. 272: "The *mens rea* of aiding and abetting consists of knowledge – in the sense of awareness – that the acts performed by the aider and abettor assist in the commission of a crime by the principal offender."

Vasiljević, (Trial Chamber), November 29, 2002, para. 71: "To establish the *mens rea* of aiding and abetting, it must be demonstrated that the aider and abettor knew (in the

sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.”

Furundžija, (Trial Chamber), December 10, 1998, para. 245, 249: “[T]he clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.” “The *mens rea* required is the knowledge that these acts assist the commission of the offence.”

For discussion of the *mens rea* for aiding and abetting under the laws of various countries, see *Krstić*, (Appeals Chamber), April 19, 2004, para. 141.

(2) need not share principal's intent, but must be aware of essential elements of the crime, including the principal's mental state

Aleksovski, (Appeals Chamber), March 24, 2000, para. 162: “[I]t is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal. It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 518: “The aider and abettor need not share the *mens rea* of the perpetrator, but he or she must be aware of the essential elements of the crime ultimately committed by the perpetrator, and must be aware of the perpetrator's state of mind.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 727 (similar); *Brićanin*, (Trial Chamber), September 1, 2004, para. 273 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 90 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 350: “While the aider and abettor need not share the *mens rea* of the principal, he must be aware of the essential elements of the crime ultimately committed by the principal.”

Vasićević, (Trial Chamber), November 29, 2002, para. 71: “The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender. The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability

from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.”³⁴

Kumarac, (Trial Chamber), February 22, 2001, para. 392: “The aider and abettor need not share the *mens rea* of the principal but he must know of the essential elements of the crime (including the perpetrator’s *mens rea*) and take the conscious decision to act in the knowledge that he thereby supports the commission of the crime.”

Furundžija, (Trial Chamber), December 10, 1998, para. 245: “[I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime.”

(3) need not know precise crime intended or committed

Blaskić, (Appeals Chamber), July 29, 2004, paras. 50: “The Trial Chamber [in *Blaskić*] agreed with the statement in the *Furundžija* Trial Judgement that ‘it is not necessary that the aider and abettor . . . know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.’ The Appeals Chamber concurs with this conclusion.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 518: “This is not to say that the aider and abettor must be aware of the specific crime that will be committed by the perpetrator. If the aider and abettor is aware that one of a number of crimes will probably be committed by the perpetrator, and one of those crimes is in fact committed, then he has intended to assist or facilitate the commission of that crime, and is guilty as an aider and abettor.”

Strugar, (Trial Chamber), January 31, 2005, para. 350: “It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and one of these crimes was in fact committed.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 272 (similar); *Kročka et al.*, (Trial Chamber), November 2, 2001, para. 255 (similar); *Furundžija*, (Trial Chamber), December 10, 1998, para. 246 (same as *Kročka*).

³⁴ For discussion of the joint criminal enterprise doctrine, see Section (V)(e), ICTY Digest.

But see *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 163: “The Trial Chambers in *Kunarac* and *Krnjelac* explained the *mens rea* of aiding and abetting as consisting of the knowledge (or awareness) that the acts performed by the aider and abettor assist in the commission of a *specific* crime by the principal. The Trial Chambers in *Furundzija*, *Blaskic*, *Krvocka*, and *Naletilic*, however, took the view that it is not necessary that the aider and abettor know the precise crime that was intended or which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated. The Trial Chamber finds the stricter definition set out in *Kunarac* and *Krnjelac* persuasive and endorses it. Further, the aider and abettor must have been aware of the essential elements of the crime ultimately committed by the principal, including his *mens rea*.” See also *Krnjelac*, (Trial Chamber), March 15, 2002, para. 90 (“The *mens rea* of aiding and abetting requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.”); *Kunarac*, (Trial Chamber), February 22, 2001, para. 392 (similar).

(4) *mens rea* may be deduced from circumstances, such as position of authority and presence

Limaj et al., (Trial Chamber), November 30, 2005, para. 518: “This awareness [that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence] need not have been explicitly expressed. It may, of course, be inferred from all relevant circumstances.”

Aleksovski, (Trial Chamber), June 25, 1999, para. 65: “The *mens rea* may be deduced from the circumstances, and the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrator of the wrongful act as a sign of support or encouragement.”

(5) *mens rea* must exist at the time of the planning, preparation or execution of the crime

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 728: “The Trial Chamber recalls that Article 7(1) of the Statute provides for individual criminal responsibility for persons who ‘aided and abetted in the planning, preparation or execution of a crime’ provided for in the Statute. Accordingly, in order to incur criminal liability, the Trial Chamber finds that the Accused must have the requisite *mens rea* at the time of the planning, preparation or execution of the crime.”

(6) *mens rea* for aider and abettor of persecution

Krnjelac, (Appeals Chamber), September 17, 2003, para. 52: “The Appeals Chamber considers that the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 164: “The aider and abettor of persecution must be aware not only of the crime he is assisting but also that it is committed with a discriminatory intent. He does not need to share the discriminatory intent but must be aware of the broader discriminatory context.”

Krocka et al., (Trial Chamber), November 2, 2001, para. 262: “The aider or abettor of persecution, as a ‘special intent’ crime, must not only have knowledge of the crime he is assisting or facilitating. He must also be aware that the crimes being assisted or supported are committed with a discriminatory intent. The aider or abettor of persecution does not need to share the discriminatory intent, but must be aware of the broader discriminatory context and know that his acts of assistance or encouragement have a significant effect on the commission of the crimes. Each and every act of discrimination need not be known or intended by the aider or abettor. The aider or abettor of persecution will thus be held responsible for discriminatory acts committed by others that were a reasonably foreseeable consequence of their assistance or encouragement.”

For discussion of the *mens rea* required for persecution as a crime against humanity, see Section (IV)(d)(viii)(4), ICTY Digest.

(7) *mens rea* for aider and abettor of genocide

Krstic, (Appeals Chamber), April 19, 2004, para. 140: The question is raised “of whether, for liability of aiding and abetting [genocide] to attach, the individual charged need only possess knowledge of the principal perpetrator’s specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime. This principle applies to the Statute’s prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting

genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal."

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 779: "As for the *mens rea* required for an aider and abettor, 'an individual who aids and abets a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime.' This principle applies to the Statute's prohibition of genocide. The Appeals Chamber concluded that '[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's specific intent is permitted by the Statute and case-law of the Tribunal.'"

See also Krstic, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 60, 62-64, 66: "An argument is that the reference to a 'person who . . . aided and abetted . . .' in article 7(1) of the Statute does not authorize a prosecution for aiding and abetting genocide. The asserted reason is that genocide and any crime related to genocide are exclusively regulated by article 4 of the Statute and that that article does not comprehend a crime of aiding and abetting genocide. More particularly, it is said that article 4 requires proof that an accused had the specific genocidal intent if he is charged with any of the crimes listed in that article including a crime of 'complicity in genocide' as mentioned in article 4(3)(e), and that aiding and abetting does not require such proof, it being only necessary to prove that an accused charged with aiding and abetting had knowledge of the intent. Therefore, a crime of aiding and abetting genocide would add to the genocidal crimes authorized by article 4, relevant provisions of which correspond to articles II and III of the Genocide Convention of 1948, which in turn reflect customary international law. That would be in breach of the well understood prohibition against adding to crimes which existed under customary international law."

"As to the main question, it seems to me that either aiding and abetting is part of complicity in genocide as the latter is referred to in article 4(3)(e) of the Statute or it is not. If it is not part of complicity in genocide, it follows that, so far as the operation of the Convention is concerned, it cannot be part of customary international law. To make an act punishable as aiding and abetting under article 7(1) of the Statute when it is not punishable as complicity in genocide under article 4(3)(e) is therefore to add impermissibly to customary international law."

"On the other hand, if aiding and abetting is part of complicity in genocide, it is part of customary international law by reason of complicity in genocide being provided for in the Genocide Convention in 1948. In that case, the reference to aiding and abetting in article 7(1) of the Statute merely reproduces customary international law as contained in the reference to complicity in genocide as mentioned in article 4(3)(e) of the Statute. So neither provision is in breach of the prohibition against adding to customary international law."

... “I see nothing in the text of the Genocide Convention or in the relevant *travaux préparatoires* which is inconsistent with the ordinary meaning of ‘complicity in genocide’ as including aiding and abetting. As has been noticed by the Appeals Chamber, the case law of the Tribunal shows that the cognate term ‘accomplice’ has different meanings depending on the context; the term may refer to a co-perpetrator or to an aider and abettor. In my view, the reference in article 4(3)(c) of the Statute to ‘complicity in genocide’ can and does include aiding and abetting.”

“This does not mean that the act of the aider and abettor does not have to be shown to be intentional. Intent must always be proved, but the intent of the perpetrator of genocide is not the same as the intent of the aider and abettor. The perpetrator’s intent is to commit genocide. The intent of the aider and abettor is not to commit genocide; his intent is to provide the means by which the perpetrator, if he wishes, can realise his own intent to commit genocide. Nor does it follow that proof of genocidal intent is in no sense required. But what has to be shown is that the perpetrator had that intent; it does not have to be shown that the aider and abettor himself had that intent. In the case of the aider and abettor what has to be shown is that he had knowledge that the perpetrator had that intent.”

See also “whether complicity in genocide requires a showing of genocidal intent,” Section (III)(f)(v)(4), ICTY Digest. See also “difference between complicity in genocide and aiding and abetting genocide,” Section (V)(d)(vi)(1), ICTY Digest.

vi) aiding and abetting genocide—elements

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 782: “An individual may be held responsible for aiding and abetting genocide if it is shown that he assisted in the commission of the crime in the knowledge of the principal perpetrator’s specific intent. Aiding and abetting genocide is therefore defined by the following elements:

- the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal that had a ‘substantial effect’ on the commission of the crime;
- the accused had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender; and
- the accused knew that the crime was committed with specific intent.”

(1) difference between complicity in genocide and aiding and abetting genocide

For a discussion of the difference between complicity in genocide and aiding and abetting genocide, see Sections (III)(f)(v)(2) and (III)(f)(v)(2)(a), ICTY Digest.

vii) application—aiding and abetting

(1) genocide at Srebrenica

Krstic, (Appeals Chamber), April 19, 2004, paras. 137, 328, 144: “[I]t was reasonable for the Trial Chamber to conclude that, at least from 15 July 1995, Radislav Krstic had knowledge of the genocidal intent of some of the Members of the VRS [Army of Republika Srpska] Main Staff. Radislav Krstic was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps [of the Army of Republika Srpska] resources, the Main Staff would not have been able to implement its genocidal plan. Krstic knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstic was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Krstic is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator. This charge is fairly encompassed by the indictment, which alleged that Radislav Krstic aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.”

“In finding Krstic criminally responsible as an aider and abettor, the Appeals Chamber concluded that the contribution by the Drina Corps personnel and assets under his command was a substantial one. Indeed, without that assistance, the Main Staff would not have been able to carry out its plan to execute the Bosnian Muslims of Srebrenica. Krstic knew that buses he had assisted in procuring for the transfer of the women, children and elderly were being used to transfer the males to various detention sites. He also knew that Drina Corps vehicles and personnel were being used to scout for detention sites and to escort and guard the Bosnian Muslim prisoners at various detention sites. He also knew that heavy vehicles and equipment belonging to the Drina Corps under his command were being used to further the execution of the Bosnian Muslim civilians. This knowledge and these modes of assistance constitute a substantial contribution to the commission of the crimes as required for a conviction for aiding and abetting the genocide of the Bosnian Muslims of Srebrenica.”

“[I]here was no evidence that Krstic ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances the criminal responsibility of Radislav Krstic is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.”

But see Krstic, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 73-75: “[I]o hold Krstic liable only as an aider and abettor would

be to understate the degree of his criminal responsibility.” “It seems to me that there are problems in reaching the conclusion that the appellant’s guilt was that of an aider and abettor. The Appeals Chamber accepts that Drina Corps personnel and resources were used for the killings. Explaining this, it said that the appellant ‘knew that by *allowing* Drina Corps [of the Army of Republika Srpska] resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstic was not a supporter of that plan, as Commander of the Drina Corps he did nothing to prevent the Main Staff from calling upon Drina Corps resources, and he *permitted* that employment of those resources.” “A substantial contribution for the purpose of aiding and abetting is a contribution that assists the perpetrator to commit his crime if he wishes to do so. That must be distinguished from participating in the commission of the crime itself. If, as I think, by ‘allowing,’ or by reason of the fact that he ‘permitted,’ the use of Drina Corps personnel and resources for the executions, the appellant authorized that use for that purpose, I would think that he was participating in the commission of the crime itself and not merely enabling the perpetrator to commit the crime if he so wished. He was therefore correctly adjudged to be guilty of genocide.” (emphasis in original)

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 784-787: “The Trial Chamber has found that Colonel Blagojevic [Commander of the Bratunac Brigade, a unit of the Army of Republika Srpska] aided and abetted the murders committed in Bratunac town. The Trial Chamber has further found that Colonel Blagojevic aided and abetted persecutions committed through the underlying acts of murder, cruel and inhumane treatment, terrorising the civilian population and forcible transfer, as well as that he aided and abetted the commission of other inhumane acts through forcible transfer. His assistance was primarily in the form of permitting resources of the Bratunac Brigade to be used in the commission of those acts As such, the Trial Chamber finds that Colonel Blagojevic rendered practical assistance in the killings and in causing serious bodily or mental harm to the Bosnian Muslims from Srebrenica. The Trial Chamber finds that these acts of practical assistance had a substantial effect on the commission of genocide.”

“The Trial Chamber further finds that Colonel Blagojevic knew that by allowing the resources of the Bratunac Brigade to be used he was making a substantial contribution to the killing of Bosnian Muslim men and to the infliction of serious bodily or mental harm on the Bosnian Muslim population.”

“The Trial Chamber finds that Colonel Blagojevic knew of the principal perpetrators’ intent to destroy in whole or in part the Bosnian Muslim group as such. The Trial Chamber infers this knowledge from all the circumstances that surrounded the take-over of the Srebrenica enclave and the acts directed at the Bosnian Muslim population which followed. In particular, the Trial Chamber recalls:

- Colonel Blagojevic's knew the goal of the Krivaja 95 operation, namely to create conditions for the elimination of the Srebrenica enclave
- Colonel Blagojevic knew that the Bosnian Muslim population in its entirety was driven out of Srebrenica town to Potocari
- Colonel Blagojevic knew that the Bosnian Muslim men were separated from the rest of the Bosnian Muslim population
- Colonel Blagojevic knew that the Bosnian Muslim women, children and elderly were forcibly transferred to non-Serb held territory
- Colonel Blagojevic knew that the Bosnian Muslim men were detained in inhumane conditions in temporary detention centres pending further transport
- Colonel Blagojevic knew that members of the Bratunac Brigade contributed to the murder of Bosnian Muslim men detained in Bratunac
- Colonel Blagojevic knew of and participated in an operation to search the terrain for the purpose of capturing and detaining Bosnian Muslim men, so as to prevent the men from 'breaking through' to Tuzla or Kladanj, *i.e.*, territory under the control of the Bosnian Muslims."

"Having found that Colonel Blagojevic rendered practical assistance that had a substantial effect on the commission of genocide in the knowledge that the principal perpetrators of these acts had the intent to destroy in whole or in part the Bosnian Muslim group from Srebrenica, the Trial Chamber therefore finds Colonel Blagojevic is responsible for complicity in genocide through aiding and abetting the commission of genocide."

Obrenovic, (Trial Chamber), December 10, 2003, para. 85: "The Trial Chamber has examined the crime of persecutions for which Dragan Obrenovic has admitted responsibility. . . . Dragan Obrenovic has been convicted under both Article 7(1) and 7(3) of the Statute. As described above, Dragan Obrenovic not only knew that members of the Zvornik Brigade [of the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska)] took part in the organisation of the killings and the burials of the executed Muslim prisoners, but also approved the release of members of the Zvornik Brigade to participate in the implementation of this plan on at least three occasions. The Trial Chamber finds that by approving the removal of his soldiers, Dragan Obrenovic participated in the implementation of the plan to kill the Muslim prisoners. While the plan to kill the Muslim prisoners was decided by commanders above Dragan Obrenovic, he released his men from their actual duties and ordered them to follow the orders that came from above. The Trial Chamber considers his participation through this action to be aiding and abetting. *See also Obrenovic*, (Trial Chamber), December 10, 2003, para. 39 (Dragan Obrenovic accepted criminal responsibility for his participation in the joint criminal enterprise).

For additional findings regarding Vidoje Blagojevic and Dragan Jokic as to the crimes of aiding and abetting extermination, persecution, and inhumane acts (forcible transfer) related to the Srebrenica massacre, see, e.g., *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, paras. 751, 753-754, 760, 770-775.

**(2) murder at the Drina River in the municipality of Visegrad,
south-eastern Bosnia-Herzegovina**

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 134-135: “The Appeals Chamber has already found that the Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber believes that the only reasonable inference available on the totality of evidence is that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant’s actions had a ‘substantial effect upon the perpetration of the crime.’” “The Appeals Chamber finds that the acts of the Appellant were specifically directed to assist the perpetration of the murders and the inhumane acts and his support had a substantial effect upon the perpetration of the crimes. The Appeals Chamber therefore finds the Appellant guilty for aiding and abetting murder pursuant to Article 3 of the Statute (Count 5).”

**(3) cruel treatment and torture at the Llapushnik/Lapusnik prison
camp in central Kosovo**

Limaj et al., (Trial Chamber), November 30, 2005, para. 658: “In the other case of mistreatment of [witness] L12 [in the Llapushnik/Lapusnik prison camp in central Kosovo] . . . , L12 was beaten in a barn. Haradin Bala blindfolded L12 and brought him to a barn, where the beating took place. L12 testified that Shala [Haradin Bala] was present during the incident. The Chamber accepts L12’s evidence, however, that Haradin Bala’s involvement in the incident was limited to bringing L12 to the perpetrators and being present while the beating was taking place. The Chamber finds that by bringing L12 to the barn and being present throughout the beating by others, Haradin Bala did contribute to the commission of the crime substantially enough to regard his participation as aiding the offence committed by the direct perpetrators. In the circumstances, Haradin Bala must have become aware, at least at the time of the beating, that the assailants were committing a crime and of their state of mind. Accordingly, he possessed the *mens rea* required for aiding and abetting. As established earlier, this incident constitutes the elements of both cruel treatment and torture.”

(4) shelling of the Old Town of Dubrovnik, Croatia

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 58: “Part of Miodrag Jokic’s behaviour, specifically certain acts and omissions before the shelling by JNA [Yugoslav Peoples’ Army] forces on 6 December 1991 [of the Old Town of Dubrovnik], in the specific circumstances of this case, is correctly qualified as aiding and abetting, since it had a substantial effect on the commission of the crimes.”

Compare Strugar, (Trial Chamber), January 31, 2005, para. 354: “[T]he Chamber has found that on 5 December 1991 the Accused ordered forces under his command to take Srd. The Chamber also found that the deliberate and unlawful shelling of the Old Town that occurred on 6 December was not implied in the Accused’s order. In the Chamber’s view, therefore, the Accused’s order to attack Srd did not have a substantial effect on preparations for the crimes charged in the Indictment and does not constitute an *actus reus* for engaging his responsibility for aiding and abetting under Article 7(1) of the Statute.”

(5) additional situations

For findings that Vidoje Blagojevic aided and abetted the commission of murder in Bratunac town, see *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, paras. 733-739, 747-749.

For findings that Dragan Jokic aided and abetted mass executions in Orahovac, Pilica/Branjevo Military Farm, and Kozluk, see *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 770.

(6) reburial operation after Srebrenica massacre not *ex post facto* aiding and abetting

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 382-283, 730-731: “The Trial Chamber finds that the evidence is sufficient to prove that mass graves at the Dam near Petkovci, Kozluk, Glogova, Orahovac, and Branjevo Military Farm [in the municipalities of Zvornic and Bratunac, in Bosnia and Herzegovina] were disturbed and that bodies were exhumed from those graves. The Trial Chamber is also of the opinion that the opening of the mass graves and the reburial of the victims in other locations was an attempt to conceal the evidence of the mass killings. The Trial Chamber further finds: that the bodies in the primary graves in Glogova contained the bodies of victims from the Kravica Warehouse massacre and that the bodies of these victims were subsequently moved to graves in the area around Zeleni Jadar; that the bodies in the graves at Branjevo Military Farm and Kozluk were taken to secondary graves along the

Cancari road; that the bodies from the graves near Orahovac were moved to smaller graves near the Hodžići road; and that the bodies in the grave at the Dam near Petkovci were reburied at a location near Lipje.”

“The evidence establishes that the reburial operation, which took place some time in September and October 1995, was ordered by the [Army of the Republika Srpska’s] Main Staff. Colonel Beara, Chief of Security of the Main Staff, and Lieutenant Colonel Popovic, Assistant Commander for Security of the Drina Corps [of the Army of Republika Srpska], directed this operation. The operation was carried out on the ground by the Bratunac and Zvornik Brigades [of the Army of Republika Srpska]. Within the Bratunac Brigade, Captain Nikolic, the Chief of Security and Intelligence, was tasked with the organisation of the operation. Within the Zvornik Brigade the Assistant Commander for Security, 2nd Lieutenant Drago Nikolic, was responsible for the operation.”

“The Trial Chamber notes that the Prosecution has pled that the reburials were ‘a natural and foreseeable consequence of the execution and original burial plan conceived by the Joint Criminal Enterprise.’ In its Judgement on Motions for Acquittal pursuant to Rule 98 *bis*, the Trial Chamber found that ‘no reasonable trier of fact could reach the conclusions that the reburials, conducted a few months after the executions, was foreseeable at the time the executions were carried out. [...] On the contrary, the evidence would rather indicate that this operation was decided in response to the scrutiny of the international community of the events following the take-over of Srebrenica, i.e. as a consequence of a fact that falls outside the scope of the joint criminal enterprise. As a result, the Trial Chamber finds that the efforts to conceal the crimes a few months after their commission could only be characterised by a reasonable trier of fact as *ex post facto* aiding and abetting in the planning, preparation or execution of the murder operation.”

“It is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime. As the reburial operation was a direct result of the scrutiny of the international community of the events following the take-over of Srebrenica, the Trial Chamber finds that the evidence does not support a conclusion that the reburial operation itself was agreed upon at the time of the planning, preparation or execution of the crimes. Consequently, the Trial Chamber finds that any involvement of Colonel Blagojevic in the reburial operation could not amount to aiding and abetting the murder operation.”

e) Joint criminal enterprise/ the common purpose doctrine

i) generally

Krnjelac, (Appeals Chamber), September 17, 2003, para. 29: “This provision [Article 7(1)] lists the forms of criminal conduct which, provided all the other conditions are

satisfied, may result in the accused's incurring criminal responsibility if he has committed any one of the crimes provided for by the Statute in one of the ways set out in this provision. Article 7(1) of the Statute does not make explicit reference to 'joint criminal enterprise.' However, the Appeals Chamber recalls that, after considering the question in the *Tadić* Appeals Judgement, it concluded that participation in a joint criminal enterprise as a form of liability, or the theory of common purpose as the Chamber referred to it, was implicitly established in the Statute"

Tadić, (Appeals Chamber), July 15, 1999, para. 190: "[T]he Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions."

Limaj et al., (Trial Chamber), November 30, 2005, para. 510: "Individual criminal responsibility arises under Article 7(1) of the Statute not only in respect of persons who perform the criminal act, but also, in certain circumstances, in respect of those who in some way make it possible for the perpetrator physically to carry out that act. When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise ('JCE') in relation to that crime."

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 695: "[U]nder the jurisprudence of the Tribunal, Article 7(1) has been found to contain the basis for charging individuals with the commission of crimes contained in the Statute 'where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.' This form of liability pursuant to Article 7(1) has become known by several terms, including 'joint criminal enterprise.'"

Brdjanin, (Trial Chamber), September 1, 2004, para. 258: "Although Article 7(1) of the Statute does not make explicit reference to [joint criminal enterprise], the Trial Chamber is satisfied that, in line with the jurisprudence of the Tribunal, persons who contribute to the commission of crimes in execution of a common criminal purpose are subject to criminal liability as a form of 'commission' of a crime pursuant to Article 7(1) of the Statute, subject to certain conditions."

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 156: “The Appeals Chamber in *Tadic* held that persons who contribute to the commission of crimes by a group in execution of a common criminal purpose are subject to criminal liability subject to certain conditions.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 307: “A joint criminal enterprise can exist whenever two or more people participate in a common criminal endeavor.” “Within a joint criminal enterprise there may be other subsidiary criminal enterprises.”

Krstić, (Trial Chamber), August 2, 2001, para. 601: “[Joint criminal enterprise] liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.”

Compare Simic, Tadic and Zarić, (Trial Chamber), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, October 17, 2003, para. 2: “I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration.”

(1) rationale for joint criminal enterprise doctrine

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 80: “The *Tadic* Appeal Judgement explains why participation in a joint criminal enterprise is a form of commission under Article 7(1):

The above interpretation [that responsibility under Article 7(1) is not limited to those who physically commit the crimes] is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.”

See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 191 (source of quoted language); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 695 (quoting Appeals Chamber in *Tadić*).

Tadić, (Appeals Chamber), July 15, 1999, para. 192: “[T]o hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 695 (quoting same).

(2) joint criminal enterprise is customary international law

Vasiljević, (Appeals Chamber), February 25, 2004, para. 95: “This provision [Article 7(1) of the Statute] lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. Article 7(1) of the Statute does not make explicit reference to ‘joint criminal enterprise.’ However, the Appeals Chamber has previously held that participation in a joint criminal enterprise is a form of liability which existed in customary international law at the time, that is in 1992. . . .” See also *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 29 (similar).

Tadić, (Appeals Chamber), July 15, 1999, para. 220: “[T]he Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.”

Babić, (Trial Chamber), June 29, 2004, para. 33: “[T]his form of liability [joint criminal enterprise] . . . is established in customary international law. . . .”

(3) joint criminal enterprise is a form of “commission”

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 79: “Although the Statute makes no explicit reference to ‘joint criminal enterprise’ as a mode of responsibility, the Appeals Chamber has held that participation in a joint criminal enterprise is a form of ‘commission’ under Article 7(1) of the Statute.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 33 (“participation in a joint criminal enterprise is a form of ‘commission’”); *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 102 (“Participation in a joint criminal enterprise is a form of ‘commission’ under Article 7(1)

of the Statute.”); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 73 (same as *Blaskić*).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 696: “As joint criminal enterprise is a form of ‘commission’ rather than a form of accomplice liability, with the term ‘accomplice’ being understood in this instance to refer to one who aids and abets the perpetrator, the accused is understood to be a perpetrator (or, more accurately in many cases, a co-perpetrator) rather than an accomplice.”

Brđanin, (Trial Chamber), September 1, 2004, para. 258: “[P]ersons who contribute to the commission of crimes in execution of a common criminal purpose are subject to criminal liability as a form of ‘commission’ of a crime pursuant to Article 7(1) of the Statute, subject to certain conditions.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 138: “The Appeals Chamber [in *Krnjelac* and *Ojandić*] recently confirmed that an accused found criminally liable for his participation in a joint criminal enterprise should be regarded as having ‘committed’ that crime, as opposed to having aided and abetted the crime; in other words, participation in a joint criminal enterprise is a form of co-perpetration.”

Stakić, (Trial Chamber), July 31, 2003, para. 432: “In the *Ojandić* Decision, the Appeals Chamber held unequivocally that joint criminal enterprise is to be regarded as a form of ‘commission’ pursuant to Article 7(1) of the Statute and not as a form of accomplice liability. Since it constitutes a form of ‘commission’ in the sense that, insofar as a participant shares the purpose of the joint criminal enterprise as opposed to merely knowing about it, he cannot be regarded as a mere aider and abettor to the crime contemplated.”

See also “joint criminal enterprise is a form of commission, although commission is broader than joint criminal enterprise,” Section (V)(c)(iv)(2), ICTY Digest. For discussion of “whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability,” see (V)(e)(viii), ICTY Digest.

(4) rationale why joint criminal enterprise is not a new crime unforeseen in the Statute

Stakić, (Trial Chamber), July 31, 2003, paras. 440, 441: “In respect of the . . . definition of ‘committing,’ the Trial Chamber considers that a more detailed analysis of co-perpetration is necessary. For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other

perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts. In the words of *Roxin*: “The co-perpetrator can achieve nothing on his own . . . The plan only “works” if the accomplice works with the other person.” Both perpetrators are thus in the same position. As *Roxin* explains, “they can only realize their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act.”

“The Trial Chamber is aware that the end result of its definition of co-perpetration approaches that of the aforementioned joint criminal enterprise and even overlaps in part. However, the Trial Chamber opines that this definition is closer to what most legal systems understand as ‘committing’ and avoids the misleading impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor.”

(5) not error to use term “accomplice” instead of “co-perpetrator” in a joint criminal enterprise

Krnjelac, (Appeals Chamber), September 17, 2003, para. 72: “The Appeals Chamber will now consider the question whether or not the Trial Chamber erred in its use of the terms *accomplice* and *co-perpetrator*, that is ‘*coauteur*,’ with regard to the participants in a joint criminal enterprise other than the principal offender. The Appeals Chamber notes that, in so doing, the Trial Chamber used the terminology of the *Tadić* Appeals Judgement. The Trial Chamber noted in paragraph 77 of the Judgment under appeal that ‘for convenience [...] the Trial Chamber will adopt the expression “*co-perpetrator*” (as meaning a type of *accomplice*) when referring to a participant in a joint criminal enterprise who was not the principal offender.’ Footnote 230 then clarifies that an *accomplice* in a joint criminal enterprise is a person who shares the intent to carry out the enterprise and whose acts facilitate the commission of the agreed crime. The Appeals Chamber holds that the Trial Chamber has not therefore erred in its use of the terms *accomplice* and *co-perpetrator*.” (emphasis in original)

See also *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 70: “The Appeals Chamber notes first of all that, in the case-law of the Tribunal, even within a single judgement, this term [accomplice] has different meanings depending on the context and may refer to a *co-perpetrator* or an *aider and abettor*.” (emphasis in original)

(6) joint criminal enterprise is a means of committing a crime, not a crime in itself

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 91: “The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself.”

For discussion of “pleading joint criminal enterprise,” see Section (X)(b)(ix)(12)(f), ICTY Digest.

ii) the three categories of joint criminal enterprise/ common purpose doctrine

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 96: “Three categories of joint criminal enterprise have been identified by the International Tribunal’s jurisprudence.” See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 82 (similar); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 697 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 258 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 30: “After considering the relevant case-law, relating principally to many war crimes cases tried after the Second World War, the *Tadic* Appeals Judgement sets out three categories of cases regarding joint criminal enterprise”

Tadic, (Appeals Chamber), July 15, 1999, para. 195: “[T]he notion of common purpose encompasses three distinct categories of collective criminality.”

(1) first category (“basic”)

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 82: “In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose.”

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 97: “The first category is a ‘basic’ form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.”

Tadić, (Appeals Chamber), July 15, 1999, para. 196: “The first . . . category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 511: “In the first type of joint criminal enterprise the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 157: “The first category is where all the participants in the joint criminal enterprise share the same criminal intent. To be established, it must be shown that the accused must have (i) voluntarily participated in one of the aspects of the common criminal design; and (ii) intended the criminal result, even if not personally effecting it.”

For additional discussion of the *mens rea* required for a first type (“basic”) joint criminal enterprise, see (V)(c)(iv)(2), ICTY Digest.

(2) second category (“systemic”)

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 82: “The second form of joint criminal enterprise, the ‘systemic’ form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.”

Vasiljević, (Appeals Chamber), February 25, 2004, para. 98: “The second category is a ‘systemic’ form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.”

Tadić, (Appeals Chamber), July 15, 1999, paras. 202-203: “The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called

‘concentration camp’ cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; *i.e.*, by groups of persons acting pursuant to a concerted plan.” “This category of cases . . . is really a variant of the first category”

Limaj et al., (Trial Chamber), November 30, 2005, para. 511: “In the second type, embracing the so-called ‘concentration camp’ cases, or systemic [joint criminal enterprise], the accused has knowledge of the nature of a system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp. In such cases the requisite intent may also be able to be inferred from proved knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp, as well as from the position of authority held by an accused in the camp.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 157: “Pursuant to the second category, the Prosecution needs to demonstrate that the accused (i) personally knew of the system to ill-treat the detainees, and (ii) had the intent to further this system.”

For additional discussion of the *mens rea* required for a second type (“systemic”) joint criminal enterprise, see (V)(e)(iv)(3), ICTY Digest.

(a) second category not limited to detention camps similar to concentration camps

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 183: “The Appeals Chamber wishes to point out that, although commonly referred to as the ‘category known as concentration camps,’ the second category of joint criminal enterprise, known as systemic, covers all cases relating to an organised system with a common criminal purpose perpetrated against the detainees. This concept of criminal responsibility has been shaped by the case-law derived from concentration camp cases from the Second World War, but reference to the concentration camps is circumstantial and in no way limits the application of this mode of responsibility to those detention camps similar to concentration camps.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 89: “The Appeals Chamber holds that, although the second category of cases defined by the *Tadic* Appeals Judgement (‘systemic’) clearly draws on the Second World War extermination and concentration camp cases, it may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Although the perpetrators of the acts tried in the concentration

camp cases were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. According to the *Tadić* Appeals Judgement, this category of cases – a variant of the first – is characterised by the existence of an organised system set in place to achieve a common criminal purpose.”

(3) third category (“extended”)

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 83: “The third, ‘extended’ form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose. The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar).

Vasiljević, (Appeals Chamber), February 25, 2004, para. 99: “The third category is an ‘extended’ form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect ‘ethnic cleansing’) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.” See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 204 (similar).

Tadić, (Appeals Chamber), July 15, 1999, para. 204: “[In the above example], [c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.”

For additional discussion of the *mens rea* required for a third type (“extended”) joint criminal enterprise, see (V)(c)(iv)(4), ICTY Digest.

For further details regarding the three categories of the common purpose/joint criminal enterprise doctrine and, *inter alia*, post-World War II cases applying it, see *Tadić* (Appeals Chamber), July 15, 1999, paras. 195-228.

See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 258, n. 687 (explaining three categories).

iii) elements—*actus reus*—all three types of joint criminal enterprise

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 96: “The Appeals Chamber [in *Vasišević*] has explained the *actus reus* of the participant in a joint criminal enterprise as follows:

First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.”

See also *Vasišević*, (Appeals Chamber), February 25, 2004, para. 100 (source of quoted language).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 31: “The Appeals Chamber [in *Tadić*] declares that the *actus reus* of this mode of participation in one of the crimes provided for in the Statute is common to each of the three categories of cases set out above and comprises the following three elements:

- (i) *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is demonstrated clearly by the *Essen Lynching* and the *Kurt Goebell* cases.
- (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

(iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.”

(emphasis in original) See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 227 (same three elements).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 698: “To find individual criminal responsibility pursuant to a joint criminal enterprise in any of the three categories, the elements which must be established are: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar); *Babić*, (Trial Chamber), June 29, 2004, para. 32 (same elements regarding crime of persecution).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 156: “For joint criminal enterprise to be constituted, the existence of the following elements need to be proved:

- a plurality of persons, not necessarily organised;
- a common plan, design or purpose (involving the commission of a crime proscribed in the Statute);
- the participation of the accused in the common plan or design to perpetrate a crime under the Statute;
- a shared intent between all the participants to further the common plan or design involving the commission of a crime;
- that the accused, even if not personally effecting the crime, intended the result.

In addition, in the case of persecution, that all the participants in the common plan, including the Accused, had a discriminatory intent needs to be demonstrated.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 312: For joint criminal enterprise liability, “an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise.”

Compare Brđjanin, (Trial Chamber), September 1, 2004, para. 260: “For both the *first and the third categories* of [joint criminal enterprise] the Prosecution must prove:

1. a plurality of persons,

2. the existence of a common plan, design or purpose ("common plan") that amounts to or involves the commission of a crime provided for in the Statute; and
3. the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute." (emphasis added)

For discussion of whether the second type of joint criminal enterprise requires proof of a common plan or purpose, see "exception: second type of joint criminal enterprise ('systemic') needs no proof of an agreement," Section (V)(c)(iii)(2)(i), ICTY Digest.

**(1) need to establish that a plurality of persons were involved
(element 1)**

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 100: "The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories First, a plurality of persons is required."

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 708: "The first element which must be established is that a plurality of persons participated in the joint criminal enterprise."

See also *Krvacka et al.*, (Appeals Chamber), February 28, 2005, para. 96; *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 31; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 698; *Babic*, (Trial Chamber), June 29, 2004, para. 32; *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 156 (all requiring a plurality of persons).

**(a) the persons need not be organized in a military, political or
administrative structure**

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 100: "[T]he plurality of persons] need not be organised in a military, political or administrative structure." See also *Tadic*, (Appeals Chamber), July 15, 1999, para. 227 (same); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 261 (same).

**(2) need to establish existence of a mutual arrangement or
understanding—a common plan or purpose (element 2)**

Krvacka et al., (Appeals Chamber), February 28, 2005, para. 117: "The jurisprudence on this issue is clear. Joint criminal enterprise requires the existence of a common purpose which amounts to or involves the commission of a crime."

Tadić, (Appeals Chamber), July 15, 1999, para. 227: One of the required elements is: “[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.” (emphasis omitted)

Brđjanin, (Trial Chamber), September 1, 2004, para. 262: “A common plan amounting to or involving an understanding or an agreement between two or more persons that they will commit a crime must be proved.” See also *Vasiljević*, (Trial Chamber), November 29, 2002, para. 66 (similar).

Stakić, (Trial Chamber), July 31, 2003, para. 435: “In order to establish individual criminal responsibility pursuant to a joint criminal enterprise, the Prosecution must prove, for all three categories the existence of a common criminal plan between two or more persons in which the accused was a participant.”³⁵

(a) a common plan or purpose is an arrangement or agreement between two or more persons to commit a crime within the Statute

Brđjanin, (Trial Chamber), September 1, 2004, para. 342: “[T]he Common Plan necessarily has to amount to, or involve, an understanding or an agreement between two or more persons that they will commit a crime within the Statute”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 158: “An understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime must be proven.”

(b) crime must result from the joint criminal plan

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 262: “In a joint criminal enterprise such as that conducted in Omarska camp [a 2nd type of joint criminal enterprise], it is necessary to prove that the death of the victim is the result of implementing a joint criminal plan, *i.e.*, of setting up a system of ill-treatment.”

³⁵ For the second type joint criminal enterprise, the *Kvočka* Appeals Chamber suggests that “setting up a system of ill-treatment” may be thought of as “implementing a joint criminal plan.” *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 262. A formal agreement is not necessary for a second type of joint criminal enterprise is necessary. See “exception: second type of joint criminal enterprise (‘systemic’) needs no proof of an agreement,” Section (V)(e)(iii)(2)(i), ICTY Digest.

**(c) arrangement need not be express, but may be inferred
from the fact that a plurality of persons acted in unison**

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 108-109: “[T]he Appellant alleges that the Trial Chamber erred in finding that the existence of an arrangement or understanding amounting to an agreement between two or more persons need not be expressed but can also be inferred.” However, “[i]t clearly results from *Tadic* Appeals Judgement that ‘[t]here is no necessity for th[e] plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.’ The Appeals Chamber in the *Furundzija* Appeals Judgement relied on this reasoning, when it identified the legal elements of co-perpetration in a joint criminal enterprise. The Appeals Chamber finds, therefore, that the Appellant’s submission is not well founded and this sub-ground of appeal must fail.”

Tadic, (Appeals Chamber), July 15, 1999, para. 227: “The common plan or purpose may . . . be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. . . .”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 699: “The existence of an agreement or understanding for the common plan, design or purpose need not be express, but may be inferred from all the circumstances. The participation of two or more persons in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act.” See also *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 158 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 435 (similar); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 66 (similar).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 699: “[T]he common plan or purpose may . . . be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.” See also *Brljanin*, (Trial Chamber), September 1, 2004, para. 262 (same).

Brljanin, (Trial Chamber), September 1, 2004, para. 262: “[T]he common plan need not be express and may be inferred from all the circumstances.”

(d) there must be a mutual understanding or arrangement

Brljanin, (Trial Chamber), September 1, 2004, para. 352: “[T]he fact that the acts and conduct of an accused facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person’s criminal intent is not sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime. An agreement between two

persons to commit a crime requires a *mutual* understanding or arrangement with each other to commit a crime.” (emphasis in original)

(e) to infer a common plan, it must be the only reasonable inference available from the evidence

Brdjanin, (Trial Chamber), September 1, 2004, para. 353: “In order to draw this inference [of an understanding or agreement between the accused and others accused of being members in the joint criminal enterprise], it must be the only reasonable inference available from the evidence.”

(f) common plan or purpose may materialize extemporaneously

Krvacka et al., (Appeals Chamber), February 28, 2005, para. 117: “The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.” See also *Krvacka et al.*, (Appeals Chamber), February 28, 2005, paras. 96, 209; *Tadic*, (Appeals Chamber), July 15, 1999, para. 227 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 262 (same); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 158 (similar).

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 109: “The common plan or purpose may materialise extemporaneously” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 699 (same).

(g) purpose for entering into the common plan is irrelevant

Brdjanin, (Trial Chamber), September 1, 2004, para. 342: “While the Common Plan necessarily has to amount to, or involve, an understanding or an agreement between two or more persons that they will commit a crime within the Statute, the underlying purpose for entering into such an agreement (*i.e.*, the ultimate aim pursued by the commission of the crimes) is irrelevant for the purposes of establishing individual criminal responsibility pursuant to the theory of [joint criminal enterprise].”

(h) when the objective changes, a new joint criminal enterprise exists

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 700-701: “If the objective of the joint criminal enterprise changes, such that the objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed, then a new and distinct joint criminal enterprise has been established. For this joint criminal enterprise, like the original joint criminal enterprise, the three elements must be established for criminal responsibility to attach. It may be that members of second joint criminal enterprise are the same as those in the original

enterprise.” “Alternatively, it may be that only some of the original members of the first joint criminal enterprise joined the second joint criminal enterprise, and thus entail criminal liability for this enterprise. A person will only be held liable for that joint criminal enterprise to which he agreed to participate in under the first category of joint criminal enterprise, and the natural and foreseeable consequences thereof for the third category of joint criminal enterprise.”

**(i) exception: second type of joint criminal enterprise
("systemic") needs no proof of an agreement**

Krocka et al., (Appeals Chamber), February 28, 2005, paras. 118-119: “In the *Krnjelac* Appeal Judgement, the Appeals Chamber confirmed that the systemic form of joint criminal enterprise does not require proof of an agreement:

The Appeals Chamber considers that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadic* case. Since the Trial Chamber’s findings showed that the system in place at the KP Dom [prison complex in Foca] sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnjelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers ‘the principal perpetrators of the crimes committed under the system’ to commit those crimes.”

“Accordingly, the Appellants’ arguments concerning the non-existence of an agreement must be dismissed.” *See also Krnjelac*, (Appeals Chamber), September 17, 2003, para. 96 (source of quoted language).

Krocka et al., (Appeals Chamber), February 28, 2005, para. 209: “In order to circumscribe the responsibility of an accused for participation in a second category of joint criminal enterprise as a co-perpetrator, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system. Once it has been established that the accused had knowledge of the system of discriminatory ill-treatment, it is a question of determining his involvement in that system, without it being necessary to establish that he had entered into an agreement with the principal perpetrators of the crimes committed under the system to commit those crimes. The Appeals Chamber considers that the Trial Chamber did not err in law by not requiring evidence of a formal agreement between the co-perpetrators in order to participate in the joint criminal enterprise.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 96: “The Appeals Chamber notes that, with regard to the crimes considered within a systemic form of joint criminal enterprise, the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused’s position of authority) and the intent to further the concerted system of ill-treatment. Using these criteria, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 158. “Regarding the second category of joint criminal enterprise, the Appeals Chamber in *Krnjelac* held that proof of the existence of a formal or informal agreement between the participants is not crucial.”

But see *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 31: “The Appeals Chamber [in *Tadić*] declares that the *actus reus* of this mode of participation in one of the crimes provided for in the Statute is common to each of the three categories of cases set out above and [requires, *inter alia*] . . . *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. . . .*” (emphasis in original) See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 698 (“To find individual criminal responsibility pursuant to a joint criminal enterprise in any of the three categories [requires, *inter alia*] . . . the existence of a common plan, design or purpose”); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar); *Babić*, (Trial Chamber), June 29, 2004, para. 32 (similar); *Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 156 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 435 (similar).

Compare *Brđjanin*, (Trial Chamber), September 1, 2004, para. 260: “For both *the first and the third categories* of [joint criminal enterprise] the Prosecution must prove:

1. a plurality of persons;
2. the existence of a common plan, design or purpose (“common plan”) that amounts to or involves the commission of a crime provided for in the Statute; and
3. the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.” (emphasis added)

(3) participation of the accused in the common plan (element 3)

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 96: “Third, the participation of the accused in the common purpose is required” See also *Vasiljević*, (Appeals

Chamber), February 25, 2004, para. 100 (same); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 31 (same).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 698: “To find individual criminal responsibility pursuant to a joint criminal enterprise in any of the three categories, [there must be proven, *inter alia*] . . . the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar); *Babic*, (Trial Chamber), June 29, 2004, para. 32 (similar regarding the crime of persecution); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 156 (similar).

(a) participation may take various forms

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 702: “There are various ways in which a person may participate in a joint criminal enterprise: (i) by personally committing the agreed crime as a principal offender, (ii) by assisting the principal offender in the commission of the agreed crime as a co-perpetrator, *i.e.* facilitating the commission of the crime with the intent to carry out the enterprise; or (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused’s position of authority or function and with knowledge of the nature of that system and intent to further that system.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 263: “Participants in a [joint criminal enterprise] may contribute to the common plan in a variety of roles. Indeed, the term participation is defined broadly and may take the form of assistance in, or contribution to, the execution of the common plan. Participation includes both direct participation and indirect participation.”

Stakic, (Trial Chamber), July 31, 2003, para. 435: “A person may participate in a joint criminal enterprise in various ways: (i) by personally committing the agreed crime as a principal offender; (ii) by assisting or encouraging the principal offender in committing the agreed crime as a co-perpetrator who shares the intent of the joint criminal enterprise; (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused’s position of authority or function and with knowledge of the nature of that system and intent to further it.” See also *Vasiljetic*, (Trial Chamber), November 29, 2002, para. 67 (similar).

**(b) participant in a joint criminal enterprise need not
physically commit or participate in any crime**

Prosecutor v. Babic, Case No. IT-03-72-A, (Appeals Chamber), July 18, 2005, para. 38: “Participation in a joint criminal enterprise does not require that the accused commit the *actus reus* of a specific crime provided for in the Statute.”

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 99, 263: “A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met. As the *Tadić* Appeals Chamber explained, ‘[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question.’ This is particularly evident with respect to the systemic form of joint criminal enterprise at issue in the present case.”

“[C]ontrary to Kvočka’s claim, to find an accused guilty of the crime of murder it is not necessary to establish his participation in each murder. For crimes committed as part of a joint criminal enterprise it is sufficient to prove not the participation of the accused in the commission of a specific crime but the responsibility of the accused in furthering the common criminal purpose. The Appeals Chamber finds that the Trial Chamber did not err in finding Kvočka guilty of the crime of murder without establishing his specific responsibility for each murder committed.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 31: “The Appeals Chamber [in *Tadić*] [required proof, among other things, of]:

Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.”

(emphasis in original) See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 227 (source of quoted language).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 81: “The Appeals Chamber notes that, in accordance with its decision in the *Tadić* Appeals Judgement, once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. The party concerned need not physically and personally commit the crime or crimes set out in the joint criminal enterprise.”

**(c) level of participation in joint criminal enterprise generally
need not be significant or substantial**

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 97: “The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise.”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 421: “[I]t is, in general, not necessary to prove the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 187: “The Trial Chamber held in paragraph 309 of the Trial Judgement that to find an individual who works in a detention camp where conditions are abusive liable as a participant in a joint criminal enterprise, ‘the participation in the enterprise must be significant.’” “The Appeals Chamber has stated that the accused’s participation in carrying out the joint criminal enterprise is likely to engage his criminal responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant nature of his contribution: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose. Contrary to the holding of the Trial Chamber, the Tribunal’s case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated. *A fortiori*, contrary to Kvočka’s submissions, such participation need not be ‘direct or significant.’ Kvočka’s arguments are thus rejected on this point.”

But see Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 159: “The Trial Chamber in *Kvočka* held that the degree of participation required must be ‘significant,’ i.e. make an enterprise ‘efficient or effective[.]’” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 306 (requiring “significant” participation of anyone who knowingly participates in the operation of a detention facility), *rejected in Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 187.

Compare Kvočka et al., (Appeals Chamber), February 28, 2005, para. 90: “The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons.”

For discussion of the substantial contribution requirement for aiding and abetting, see “level of participation for aider and abettor: must have a substantial effect,” Section

(V)(e)(iii)(3)(d), ICTY Digest. See also under discussion of aiding and abetting “cause-effect relationship not required, but must have a substantial effect on the commission of the crime,” Section (V)(d)(iv)(3), ICTY Digest.

(i) in practice, significance of participation may be relevant to demonstrating shared intent

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 97: “In practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.” See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 188 (similar).

(ii) exception: where there is an opportunistic visitor, a substantial contribution to the overall effect of the camp is necessary

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 599: “The Appeals Chamber is of the opinion that a person need not have any official function in the camp or belong to the camp personnel to be held responsible as a participant in the joint criminal enterprise. It might be argued that the possibility of ‘opportunistic visitors’ entering the camp and mistreating the detainees at random added to the atmosphere of oppression and fear pervading the camp. In the view of the Appeals Chamber, it would not be appropriate to hold every visitor to the camp who committed a crime there responsible as a participant in the joint criminal enterprise. The Appeals Chamber maintains the general rule that a substantial contribution to the joint criminal enterprise is not required, but finds that, in the present case of ‘opportunistic visitors,’ a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine. The Appeals Chamber maintains the general rule that a substantial contribution to the joint criminal enterprise is not required, but finds that, in the present case of ‘opportunistic visitors,’ a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 667: “With regard to the different crimes committed against different detainees in the camp, it cannot be ruled out on the available evidence that some of the perpetrators of the crimes established in, or in connection with, the prison camp did so merely as visitors who came to the camp on an *ad hoc* basis and while there, for personal reasons, such as revenge, mistreated or killed old enemies. It is true that such ‘opportunistic visitors’ could also have become participants in the alleged joint criminal enterprise by contributing to the overall effect of the prison camp. However, in order to prove their participation it would be necessary to establish that their contribution to the pursuance of the common purpose of the alleged joint criminal enterprise was substantial.”

(d) level of participation for aider and abettor: must have a substantial effect

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 188: “The extent of the material participation is also a decisive factor when assessing the responsibility of an individual for aiding and abetting the crimes committed by the plurality of persons involved in the joint criminal enterprise. As stated in the Tribunal’s case-law, the aider and abettor must make a substantial contribution to the crime in order to be held responsible.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 289: “The assistance or facilitation provided by the aider or abettor must of course have a substantial effect on the crime committed by a co-perpetrator.”

See also under discussion of aiding and abetting “cause-effect relationship not required, but must have a substantial effect on the commission of the crime,” Section (V)(d)(iv)(3), ICTY Digest.

(e) participant must perform acts directed at furthering or in furtherance of the common plan or purpose

Babić, (Appeals Chamber), July 18, 2005, para. 38: “Co-perpetratorship in a joint criminal enterprise, for which the Appellant was found guilty, only requires that the accused shares the *mens rea* or ‘intent to pursue a common purpose’ and performs some acts that ‘in some way are directed to the furtherance of the common design.’”

Brdjanin, (Trial Chamber), September 1, 2004, para. 263: “In order to incur criminal liability, the accused is required to take action in contribution of the implementation of the common plan.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 158: “A joint criminal enterprise requires, in addition to a showing that several individuals agreed to commit a crime, that the parties to the agreement took action in furtherance of that agreement.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 289: “The precise threshold of participation in joint criminal enterprise has not been settled, but the participation must be ‘in some way . . . directed to the furthering of the common plan or purpose.’”

(f) participant in a joint criminal enterprise need not be physically present during crime

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 112-113: “The Appeals Chamber affirms that a co-perpetrator in a joint criminal enterprise need not physically commit any part of the *actus reus* of the crime involved. Nor is the participant in a joint

criminal enterprise required to be physically present when and where the crime is being committed.” “While it is legally possible for an accused to be held liable for crimes committed outside of his or her presence, the application of this possibility in a given case depends on the evidence.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 81: “The Appeals Chamber considers that the presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required either for this type of liability to be incurred.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 158: “[The Appeals Chamber in *Krnjelac*] also confirmed that presence at the time of the crime is not necessary. A person can still be held liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out.”

(i) application—could be convicted of crimes while absent from the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 296, 298: “Kvočka submits that the Trial Chamber held that he was not responsible for crimes committed in the period when he was absent from the [Omarska] camp and, therefore, it should have considered his work schedule in the camp to take into account his days off.” Rejecting this argument: “The Appeals Chamber . . . notes that it has already determined that the Trial Chamber did not limit Kvočka's responsibility to the period he was physically present in the camp but held him responsible for crimes committed in the camp from about 29 May to 23 June 1992, *i.e.*, during the time that he was employed in the camp.”

(ii) application—could not be convicted of murder that may have occurred before arrival at the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 266, 268: “Kvočka replies that since the Prosecution accepts that the killing of [Ahil] Dedić occurred a few hours before he arrived at the camp for the first time, he should not be held responsible for the murder.” “The Appeals Chamber holds that since the Trial Chamber provided no detailed information or convincing factual basis, it has not been proved that the murder of Ahil Dedić was committed after Kvočka's arrival in Omarska camp, the time limit set by the Trial Chamber on Kvočka's responsibility. The Appeals Chamber grants this ground of appeal and finds that the Trial Chamber erred in finding Kvočka guilty of the murder of Ahil Dedić.”

(g) all participants equally guilty regardless of part played

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 110-111: “[T]he Appellant challenges the Trial Chamber’s finding that, if the agreed crime is committed by one or more of the participants in a joint criminal enterprise, all of the participants are equally guilty of the crime regardless of the part played by each in its commission.” “The Appeals Chamber recalls that the case-law of the Tribunal stemming from the *Tadic* Appeals Judgement and the *Ojdanic* Decision regards participation in a joint criminal enterprise as a form of commission. In light of this established case-law, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in finding all of the participants in the joint criminal enterprise to be equally guilty of the crime regardless of the part played by each in its commission.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 702: “Regardless of the role each played in its commission, all of the participants in the enterprise are guilty of the same crime.”

Stakic, (Trial Chamber), July 31, 2003, para. 435: “Provided the agreed crime is committed by one of the participants in the joint criminal enterprise, all the participants are equally guilty of the crime regardless of the role each played in its commission.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 67: “If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.”

(h) participation not satisfied by mere membership in an organization

Brđjanin, (Trial Chamber), September 1, 2004, para. 263: “Individual criminal responsibility for participation in a [joint criminal enterprise] does not arise as a result of mere membership in a criminal enterprise.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 158: “Joint criminal enterprise is not a liability for mere membership of a criminal enterprise as it is concerned with the *participation* in the commission of a crime as part of a joint criminal enterprise.” (emphasis in original)

Stakic, (Trial Chamber), July 31, 2003, para. 433: “The Trial Chamber emphasises that joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount

to a flagrant infringement of the principle *nullum crimen sine lege*. This must always be borne in mind when working with this definition of the term ‘commission.’”

(i) not necessary to show offense would not have occurred but for the accused’s participation, but involvement must form a link in the chain of causation

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 98: “The Appeals Chamber agrees that the Prosecutor need not demonstrate that the accused’s participation is a *sine qua non*, without which the crimes could or would not have been committed. Thus, the argument that an accused did not participate in the joint criminal enterprise because he was easily replaceable must be rejected.” *See also Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 193.

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 702: “The Trial Chamber concurs with the Trial Chamber in the *Brđjanin* case that while the participation of the accused need not be a *conditio sine qua non* for the commission of the offence, the accused’s involvement in the criminal act must form a link in the chain of causation.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 263: “An accused’s involvement in the criminal act must form a link in the chain of causation. This means that the Prosecution must at least establish that the accused took action in furtherance of the criminal plan. However, it is not necessary that the participation be a *conditio sine qua non*, or that the offence would not have occurred but for the accused’s participation.”

(j) inability to improve camp conditions/prevent crimes irrelevant where accused supported and furthered a joint criminal enterprise

(i) application—the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 292, 295, 383: “[Kvočka] contends that he had no authority as a security service member to influence or improve the conditions of detention, including the quality and quantity of water and food, conditions that were recognized by the Trial Chamber as elements of torture.”

“When assessing the responsibility of an accused for crimes committed as part of a joint criminal enterprise, it is not a matter of determining what the accused could have done but what he did do to contribute to the joint criminal enterprise. That Kvočka was unable to improve the conditions of detention is of no consequence to his criminal responsibility since his contribution to the joint criminal enterprise encompassing the crimes resulting from the conditions of detention has been established.”

“Equally without merit is Radic’s argument that he cannot be held responsible for crimes he was unable to prevent because of the chaotic situation in the camp. The Trial Chamber found that the Omarska camp functioned as a joint criminal enterprise, and that Radic knowingly and substantially contributed to the functioning of the camp. Once the Trial Chamber had established these facts, the conclusion that Radic was responsible for the crimes committed during his participation in the joint criminal enterprise was correct, regardless of his power to prevent individual crimes. Unlike the position under Article 7(3) of the Statute, responsibility for participation in a joint criminal enterprise under Article 7(1) of the Statute does not require proof that the perpetrator has the authority to prevent the crimes. Radic is responsible not because he did not prevent the crimes in question, but because he supported and furthered a criminal enterprise which allowed individuals to maltreat detainees at will.”

**(k) leadership position/superior responsibility not required,
but is relevant to determine scope of participation or as an
aggravating circumstance**

(i) application—the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 104, 192: “In another related argument, Appellant Radic submits that he should not be found guilty as a co-perpetrator since the Trial Chamber acquitted him of all charges based on superior responsibility. The suggestion implicit in this argument is that a person lacking sufficient authority to be considered a superior would necessarily also lack sufficient authority to make a ‘significant contribution’ to a systemic joint criminal enterprise. The Appeals Chamber notes that participation in a joint criminal enterprise pursuant to Article 7(1) of the Statute and superior responsibility pursuant to Article 7(3) of the Statute are distinct categories of individual criminal responsibility, each with specific legal requirements. Joint criminal enterprise responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution.”

“Although a *de jure* or *de facto* position of authority is not a material condition required by law under the theory of joint criminal enterprise, the Appeals Chamber stresses that it is a relevant factor in determining the scope of the accused’s participation in the common purpose.”

Babić (Trial Chamber), June 29, 2004, para. 60: “The position of political leader is not required for participation in a [joint criminal enterprise], nor is it a precondition for the crime of persecution. Thus it is not an element establishing criminal liability, and the Trial Chamber has not considered it as such in determining Babić’s criminal responsibility. The latter stems from his conduct of contributing to the furtherance of the objective of the [joint criminal enterprise] through the crime of persecution. Thus

the submission of the Defence does not prevent the Trial Chamber from taking into consideration Babic's leadership positions as an aggravating circumstance."

(l) actual duties not job title used to determine participation in joint criminal enterprise

(i) application—the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 622: "[T]he Appeals Chamber considers that the title of administrative aide used by the Trial Chamber to describe [Prcac] is not material to the finding that he was a co-perpetrator in a joint criminal enterprise. The Trial Chamber did not consider the fact of being an administrative aide to be indicative of criminal responsibility. The title itself was given only to sum up his duties, which were different from those of the other guards or their superiors. The Trial Chamber correctly assigned responsibility on the basis of Prcac's actual duties rather than on the basis of a mere descriptive label."

iv) *mens rea*

(1) generally

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 101: "[T]he *mens rea* differs according to the category of joint criminal enterprise under consideration:

- With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).
- With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment.
- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises 'only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*'— that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise."

(emphasis in original) *See also Krnojelac*, (Appeals Chamber), September 17, 2003, para. 32 (similar).

See also Stakić, (Trial Chamber), July 31, 2003, paras. 437, 442: “The Trial Chamber notes with special reference to the *mens rea* of joint criminal enterprise that Article 7(1) lists modes of liability only. These can not change or replace elements of crimes defined in the Statute. In particular, the *mens rea* elements required for an offence listed in the Statute cannot be altered.” “In respect of the *mens rea*, the Trial Chamber re-emphasises that modes of liability can not change or replace elements of crimes defined in the Statute and that the accused must also have acted in the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts. Furthermore, the accused must be aware that his own role is essential for the achievement of the common goal.”

(2) first type (“basic”): must prove common state of mind

Vasiljević, (Appeals Chamber), February 25, 2004, para. 101: “With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 708 (similar).

Krnojelac, (Appeals Chamber), September 17, 2003, para. 84: “The Appeals Chamber finds that, apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators’ joint criminal intent.”

Tadić, (Appeals Chamber), July 15, 1999, para. 220: “[I]n cases of co-perpetration, [a showing is required that] all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent).”

Limaj et al., (Trial Chamber), November 30, 2005, para. 511: “In the first type of joint criminal enterprise the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 264: “The first category of JCE [joint criminal enterprise] requires that all participants in the JCE share the same criminal intent.” “To establish responsibility under the first category of JCE, it needs to be shown that the accused (i) voluntarily participated in one of the aspects of the common

plan, and (ii) intended the criminal result, even if not physically perpetrating the crime.”
See also Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 703 (similar).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 160: “To prove the basic form of joint criminal enterprise, the Prosecution must demonstrate that each of the persons charged, and (if not one of those charged) the principal offender or offenders, had a common state of mind, that which is required for that crime.”

Stakić, (Trial Chamber), July 31, 2003, para. 436: “The basic category of joint criminal enterprise requires proof that the accused shared the intent specifically necessary for the concrete offence, and voluntarily participated in that enterprise.” *See also Vasiljević*, (Trial Chamber), November 29, 2002, para. 68 (similar); *Kučeka et al.*, (Trial Chamber), November 2, 2001, paras. 284, 271 (similar); *Krstić*, (Trial Chamber), August 2, 2001, para. 613 (similar).

**(a) inference of state of mind must be the only reasonable
inference available**

Vasiljević, (Appeals Chamber), February 25, 2004, para. 120: “The Appeals Chamber agrees with the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.”

Vasiljević, (Appeals Chamber), February 25, 2004, para. 131: “The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.”

Vasiljević, (Trial Chamber), November 29, 2002, paras. 68-69: “Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.” “If the Trial Chamber is not satisfied that the Prosecution has proved that the Accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a joint criminal enterprise, it may then consider whether it has nevertheless been proved that the Accused incurred criminal responsibility for any of those crimes as an aider and abettor to their commission.”

(b) not necessary to show complete agreement to every crime committed; however, must be common plan to commit the crime charged

Brdjanin, (Trial Chamber), September 1, 2004, para. 264: “The Trial Chamber accepts that, while a JCE [joint criminal enterprise] may have a number of different criminal objects, it is not necessary for the Prosecution to establish that every participant agreed to every one of the crimes committed. However, it is necessary for the Prosecution to prove that, between the member of the JCE physically committing the material crime charged and the person held responsible under the JCE for that crime, there was a common plan to commit at least that particular crime.”

(c) application—inferring intent for first type joint criminal enterprise: murder at the Drina River, municipality of Visegrad, south-eastern Bosnia and Herzegovina—intent not properly inferred

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 129-132: “The actions of the Appellant . . . upon which the Trial Chamber relied to infer that he intended that the seven Muslim men to be killed, are the following: While Milan Lukic, the two unidentified men and the Appellant escorted the seven Muslim men to the bank of the Drina River, the Appellant pointed a gun at them to prevent their escape. Then, the Appellant stood behind the seven Muslim men with his gun shortly before the shooting occurred. The Trial Chamber did not find, however, that the Appellant acted at the same level of authority or with the same degree of control over the killings as the other three actors. To the contrary, the Trial Chamber stated that it is [*sic*] ‘is not satisfied that the Prosecution has established beyond reasonable doubt that the Accused fired his weapon at the same time as the other three, or that he personally killed anyone or more of the victims.’ The Trial Chamber did not even explicitly find that the Appellant pointed his gun at the seven Muslim men while they were lining up facing the Drina River.”

“In addition to these findings, the Appeals Chamber takes into consideration: i) the overall context of the Drina River incident; ii) the previous association of the Appellant with the Milan Lukic group [a Serb para-military group, with a reputation for being particularly violent, led by Milan Lukic] at Musici as well as at the Vilina Vlas Hotel, although he was not found to be a member of the group; iii) the Appellant’s participation with Milan Lukic and others in searching the house of witness VG-59’s father in Musici; iv) the fact that Milan Lukic and the two unidentified men forcibly detained the seven Muslim men; the Appellant, who was armed in the hotel, thereby assisted in preventing the seven Muslim men from fleeing from the hotel; v) the fact that the Appellant did not know until the car stopped in Sase that the seven Muslim men

were to be killed; vi) the behaviour of the soldiers changed drastically from the moment Milan Lukic ordered them to leave the car; vii) that throughout the entire incident the impression of the two survivors was that no one around Milan Lukic could have influenced him or his decisions; and viii) that the Appellant willingly accompanied Milan Lukic and his group with the seven Muslim men to the Drina River.”

“The Appeals Chamber is satisfied that no reasonable tribunal could have found that the only reasonable inference available on the evidence . . . is that the Appellant had the intent to kill the seven Muslim men. The Trial Chamber found that the Appellant assisted Milan Lukic and his men by preventing the seven Muslim men from fleeing. It did not find, however, that the Appellant shot at the Muslim men himself, nor that he exercised control over the firing. Compared to the involvement of Milan Lukic and potentially one or both of the other men, the participation of the Appellant in the overall course of the killings did not reach the same level. The above-mentioned acts of the Appellant were ambiguous as to whether or not the Appellant intended that the seven Muslim men be killed. This conclusion is further supported by the relatively short period of time between the change of attitude of Milan Lukic and the shooting, the strong personality of Milan Lukic compared to the Appellant, as well as the factors mentioned in paragraph 130. The Appeals Chamber, therefore, concludes that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men.” “The error made by the Trial Chamber led to a miscarriage of justice since, without the proof the Appellant’s intent, the Appellant would not be responsible as a co-perpetrator in the joint criminal enterprise.”

(3) second type (“systemic”): need to prove personal knowledge of the system of ill-treatment and intent to further that system

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 101: “With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first [form of joint criminal enterprise]), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused’s position of authority), as well as the intent to further this system of ill-treatment.” *See also Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 105 (similar); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 89 (similar).

Tadic, (Appeals Chamber), July 15, 1999, para. 220: “[I]n the so-called ‘concentration camp’ cases, . . . the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 511: “In the second type, embracing the so-called ‘concentration camp’ cases, or systemic [joint criminal

enterprise], the accused has knowledge of the nature of a system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp.”

Compare Kvočka et al., (Appeals Chamber), February 28, 2005, para. 110: “The Appeals Chamber affirms the Trial Chamber’s conclusion that participants in a basic *or systemic* form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators.” (emphasis added)³⁶

But see Kmojelac, (Appeals Chamber), September 17, 2003, para. 84: “The Appeals Chamber finds that, apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators’ joint criminal intent.”

(a) inferring intent

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 243: “The Appeals Chamber agrees with the Trial Chamber’s argument that, given the absence of direct evidence, intent may be inferred from the circumstances, for example, from the accused’s authority in the camp or the hierarchical system. The Trial Chamber also rightly stated that an intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp. The threshold from which an accused may be found to possess intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration depends in the final analysis mainly on the circumstances of the case.”

Tadić, (Appeals Chamber), July 15, 1999, para. 220: “Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organisational hierarchy.”

³⁶ Note, however, that *Kvočka* involved a type two joint criminal enterprise based on persecution, which requires a specific intent to discriminate on political, racial or religious grounds. See “discriminatory intent required for persecution,” Section (IV)(d)(viii)(4)(a), ICTY Digest; see also “where crime requires special intent (such as persecution), must prove such intent,” Section (V)(e)(iv)(5), ICTY Digest. Furthermore, while the Appeals Chamber in *Kvočka* required a showing of shared intent for the systemic joint criminal enterprise, *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 110, it observed that the existence of such shared intent “may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp.” *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 243.

Limaj et al., (Trial Chamber), November 30, 2005, para. 511: “In such [second type of joint criminal enterprise] cases the requisite intent may . . . be able to be inferred from proved knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp, as well as from the position of authority held by an accused in the camp.”

(b) motive immaterial

(i) application—the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 105-106, 242: “Each of the Appellants suggests that he lacked the necessary intent to further the joint criminal enterprise, and that he was merely doing his job. The Prosecution responds that the shared criminal intent to further the joint criminal enterprise ‘implies neither personal enthusiasm nor satisfaction, nor personal initiative in performing the relevant contribution to the common criminal design.’ The Prosecution emphasizes that the motives of the accused are immaterial for the purposes of assessing that accused’s intent and criminal responsibility.”

“The Appeals Chamber agrees with the Prosecution and notes that it has repeatedly confirmed the distinction between intent and motive:

The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the Tadić appeal judgement the Appeals Chamber stressed the irrelevance and ‘inscrutability of motives in criminal law.’

Shared criminal intent does not require the co-perpetrator’s personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise. Therefore, the Appellants’ argument in this regard is rejected.”

“The Appeals Chamber considers therefore that Kvočka’s submission that he was simply carrying out his duties in accordance with the police requirements is without merit. Incidentally, it does not appear that maintaining a camp which seeks to subjugate and persecute detainees based on their ethnicity, nationality or political persuasion and in which living conditions are intolerable and the most serious beatings are regularly meted out can possibly be considered as performing ‘duties in accordance with the police requirements.’”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 416: “The Appeals Chamber notes that Radic acknowledges that he was aware of the crimes committed in the camp. His argument, that he worked in the camp because of his orders and fear of the consequences of disobeying them, confounds intent and motives. As long as he

participated in the functioning of the camp knowingly and willingly, his motives for doing so are irrelevant to the finding of his guilt.”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 224: “The fact that Kvočka was thought to be a traitor by some of his superiors and colleagues could tend to show that Kvočka lacked enthusiasm in executing his duties in the camp, but such lack of enthusiasm, though relevant to motives, would not affect his intent to further the joint criminal enterprise.”

See also Krnojelac, (Appeals Chamber), September 17, 2003, para. 100: “[S]hared criminal intent does not require the co-perpetrator’s personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise.”

See also Krnojelac, (Appeals Chamber), September 17, 2003, para. 102: “It is the Appeals Chamber’s belief that this distinction between intent and motive must also be applied to the . . . crimes laid down in the Statute.”

(c) irrelevant that accused neither wanted nor contributed to the infliction of severe pain or suffering where contributed to operation and maintenance of joint criminal enterprise

(i) application—the Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 308: “Turning to Kvočka’s argument that he neither wanted nor contributed to the infliction of severe pain or suffering, the Appeals Chamber has already determined that, in contributing to the daily operation and maintenance of the Omarska camp, Kvočka allowed the perpetuation of the system of ill-treatment, thereby furthering the common criminal purpose. As such, Kvočka contributed to the perpetration of the crimes committed when he was employed in the camp, including the crimes of torture. Further, the Trial Chamber correctly established that Kvočka knew the common criminal purpose of the Omarska camp and intended to participate in it, which encompassed the perpetration of the crimes. Therefore, Kvočka’s argument that he should not be found responsible since he had not wanted or contributed to the severe physical pain and psychological suffering of Witness AK, Asef Kapetanovic, Witness AJ and Emir Beganovic is rejected.”

(d) participant in a joint criminal enterprise need not know of each crime committed

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 276: “With regard to knowledge of this specific crime, the Appeals Chamber concurs with the finding of the Trial Chamber that a participant in a joint criminal enterprise would not need to know of each crime committed in order to be criminally liable. Merely knowing that crimes are

being committed within a system and knowingly participating [7] in that system in a way that facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently is enough in this regard.”

(e) infrequently assisting detainees not inconsistent with finding *mens rea*

(i) application—Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 213: “The Appeals Chamber recalls that the level of an individual’s contribution to the joint criminal enterprise is a relevant factor in determining whether he has the requisite *mens rea* of a co-perpetrator.” “In this instance, the Trial Chamber balanced Kvočka’s infrequent intervention to improve the situation of certain detainees, family members or others, and to prevent crimes from being committed with the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavour. The Appeals Chamber finds that Kvočka does not demonstrate how his infrequent intervention to assist the detainees is *per se* inconsistent with the Trial Chamber’s finding that he shared the intent to further the common criminal purpose.” *See also Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 212. *But see* “second type (‘systemic’): need to prove personal knowledge of the system of ill-treatment and intent to further that system,” Section (V)(e)(iv)(3), ICTY Digest (suggesting that shared intent may not be the *mens rea* for the second type of joint criminal enterprise).

(f) lack of awareness of crimes at outset of participation

(i) application—Omarska camp

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 203: “The Appeals Chamber considers that, even though Kvočka may have participated in the joint criminal enterprise, without being aware at the outset of its criminal nature, the facts of the case prove that he could not have failed to become aware of it later on. The harsh detention conditions, the continuous nature of the beatings of the non-Serb detainees and the widespread nature of the system of ill-treatment could not go unnoticed by someone

³⁷ Most decisions require knowledge of the system of ill-treatment and “intent” to further that system. *See Vasiljević*, (Appeals Chamber), February 25, 2004, para. 101 (requiring “personal knowledge of the system of ill-treatment . . . as well as the intent to further this system of ill-treatment.”); *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 105 (similar); *Kmočević*, (Appeals Chamber), September 17, 2003, para. 89 (similar); *Tadić*, (Appeals Chamber), July 15, 1999, para. 220 (similar); *Limač et al.*, (Trial Chamber), November 30, 2005, para. 511 (similar).

working in the camp for more than a few hours, and in particular by someone in a position of authority such as that held by Kvočka. Kvočka's submission that he was not aware of the criminal nature of the system in place at the camp is bound to fail."

(4) third type ("extended"): if the crime went beyond the scope of the joint criminal enterprise, must prove intent to participate, the crime was foreseeable, and the accused willingly took the risk that the crime might occur

Đerongjić, (Appeals Chamber), July 20, 2005, para. 43: "The requisite *mens rea* for responsibility for crimes committed as a result of one's acts or omissions under the extended form of joint criminal enterprise is twofold:

First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise."

See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 83 (source of quoted language); *Babić*, (Appeals Chamber), July 18, 2005, para. 27 (same language as quoted).

Babić, (Appeals Chamber), July 18, 2005, para. 27: "Under the third, 'extended' prong of the joint criminal enterprise theory recognised by the jurisprudence of the International Tribunal, the critical question with regard to the Appellant's *mens rea* was whether he had the intent to participate in the joint criminal enterprise, and not whether he specifically sought to bring about secondary crimes; so long as the secondary crimes were foreseeable and the Appellant willingly undertook the risk that they would be committed, he had the legally required 'intent' with respect to those crimes."

Blaskić, (Appeals Chamber), July 29, 2004, para. 33: "In the *Vasiljević* Appeal Judgement, the Appeals Chamber considered the issue of *mens rea*, but in relation to the extended form of joint criminal enterprise. . . :

With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises 'only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*' – that is, being aware that such crime was a possible consequence

of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.
(emphasis in original) *See also Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 101 (source of quoted language).

Krstic, (Appeals Chamber), April 19, 2004, para. 150: “For an accused to incur criminal responsibility for acts that are natural and foreseeable consequences of a joint criminal enterprise, it is not necessary to establish that he was aware in fact that those other acts would have occurred. It is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise aware of the probability that other crimes may result.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 512 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 703 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, paras. 265, 709 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 436 (similar); *Krstic*, (Trial Chamber), August 2, 2001, para. 613 (similar).

Tadic, (Appeals Chamber), July 15, 1999, para. 228: “[R]esponsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*” (emphasis in original) *See also Tadic*, (Appeals Chamber), July 15, 1999, para. 220.

Babic, (Trial Chamber), June 29, 2004, para. 39: “Liability for crimes committed outside the plan of the [joint criminal enterprise] is possible if secondary crimes were the foreseeable consequence of the crimes agreed upon.”

**(a) crimes outside the joint criminal enterprise relevant where
there is a second type of joint criminal enterprise**

Krocka et al., (Appeals Chamber), February 28, 2005, para. 86: “The Appeals Chamber notes . . . that the Trial Chamber did not hold any of the Appellants responsible for crimes beyond the common purpose of the joint criminal enterprise. Nonetheless, the Appeals Chamber wishes to affirm that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of joint criminal enterprise, which may involve a large number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise

does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.” (emphasis in original)

(5) where crime requires special intent (such as persecution), must prove such intent

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 110: “[F]or crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 288: “Where the crime requires special intent, such as the crime of persecution . . . the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator.”

(6) where joint criminal enterprise is to commit genocide

Brđjanin, (Trial Chamber), September 1, 2004, para. 708: “[T]he participant in a [joint criminal enterprise] of the first category must share with the person who physically carried out the crime the state of mind required for that crime. In the case of the crime of genocide, the two must share the specific intent.”

(a) whether there can be a third type of joint criminal enterprise regarding genocide

Brđjanin, (Trial Chamber), September 1, 2004, para. 709: With respect to the third category of joint criminal enterprise, “[w]here the crime charged is the crime of genocide, the Appeals Chamber [in the Rule 98 bis Appeal in *Brđjanin*] has held that ‘the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent.’”

But see Stakić, (Trial Chamber), July 31, 2003, para. 530: “According to this Trial Chamber, the application of a mode of liability can not replace a core element of a crime. The Prosecution [who argued that in the narrow case of a type 3 joint criminal enterprise, proof of *dolus specialis* is not required] confuses modes of liability and the crimes themselves. Conflating the third variant of joint criminal enterprise and the crime

of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to ‘commit’ genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of ‘escalation’ to genocide, or genocide as a ‘natural and foreseeable consequence’ of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).”

(b) distinguishing escalation to genocide from genocide as a natural and foreseeable consequence of a joint criminal enterprise not aimed at genocide

Brđjanin, (Trial Chamber), September 1, 2004, para. 710: “[T]he Trial Chamber finds it necessary to distinguish the notion of ‘escalation’ to genocide from the notion of genocide as a ‘natural and foreseeable consequence’ of a [joint criminal enterprise] not aimed specifically at genocide. ‘Escalation’ to genocide merely designates a factual allegation that the specific intent for genocide was formed at a stage later than the onslaught of an initial operation not amounting to genocide. According to the *Krstić* Trial Chamber, ‘Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period. It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation.’ The factual scenario described does not rule out that genocide may have been within the common purpose of the [joint criminal enterprise].”

But see Stakić, (Trial Chamber), July 31, 2003, para. 530: “The notions of ‘escalation’ to genocide, or genocide as a ‘natural and foreseeable consequence’ of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).”

v) application—joint criminal enterprise

(1) first type of joint criminal enterprise—forced labor at KP Dom prison complex in Foca as a form of persecution

Knojelac, (Appeals Chamber), September 17, 2003, paras. 206-207: “[T]he Appeals Chamber considers that Knojelac must not be deemed a mere aider and abettor but a co-perpetrator of the crimes of forced labour. The Appeals Chamber holds that Knojelac shared the intent to make the non-Serb detainees perform unlawful labour in conditions which it found to be such that it was impossible for them freely to consent to work. The Appeals Chamber finds that the only conclusion which a reasonable trier of fact should have reached was that Knojelac was guilty as a co-perpetrator of persecution based on the forced labour of the non-Serb detainees for the following

reasons: Krnojelac was aware of the initial decision to use KP Dom [prison complex in Foca] detainees to work and was responsible for all the business units and work sites associated with the prison and, as such, played a central role. Moreover, Krnojelac voluntarily accepted the position in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity and he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom. He exercised final control over the work of detainees in and for the KP Dom. He had regular meetings with the heads of the furniture factory, metal workshop and farm where detainees worked.”

“In light of the foregoing, the Appeals Chamber believes that Krnojelac could not have failed to share the intent to use unlawfully detained non-Serb prisoners to work. The Appeals Chamber therefore finds that the Trial Chamber’s decision to acquit Krnojelac of the crime of persecution based on forced labour must be reversed and that, pursuant to Article 7(1) of the Statute, Krnojelac must be convicted of persecution based on forced labour as a co-perpetrator of the joint criminal enterprise whose purpose was to persecute the non-Serb detainees by exploiting their forced labour.”

(2) first type of joint criminal enterprise—forcible displacement involving KP Dom prison complex detainees as a form of persecution

Krnojelac, (Appeals Chamber), September 17, 2003, paras. 246, 241: “Krnojelac bears individual criminal responsibility for the exchanges which were part of the joint criminal enterprise in which he personally played a role with the ultimate aim of forcibly displacing the detainees under his control in the KP Dom [prison complex]. Even if he did not have control over a specific stage of the operation, he accepted the final result of the enterprise. It is thus not necessary to prove that he personally participated in compiling the lists. The ‘exchanges’ started during the summer of 1992 and continued at least until March 1993. As stated above, the Appeals Chamber is satisfied that non-Serb detainees were taken from the KP Dom with discriminatory intent. According to his own testimony, Krnojelac knew that the detainees were being removed from the KP Dom. Furthermore, the Trial Chamber established that, by virtue of his position as prison warden, Krnojelac knew that non-Serb detainees were unlawfully detained as a result of their ethnicity. As warden, Krnojelac authorised the KP Dom personnel to turn over non-Serb detainees. He supported such removals by allowing them to continue. Without illegal imprisonment, it would not have been possible to continue carrying out exchanges. The Appeals Chamber is satisfied that Krnojelac shared the intent of the principal perpetrators in the joint criminal enterprise aimed at removing the non-Serb detainees from the KP Dom.” “The Appeals Chamber is convinced, beyond all reasonable doubt, that Krnojelac is liable as a co-perpetrator in a joint criminal

enterprise whose objective was to persecute the KP Dom detainees by deporting and expelling them.”

(3) first type of joint criminal enterprise—common plan to persecute non-Serb civilians in the municipality of Bosanski Samac

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, paras. 984, 986, 987, 992: “The Trial Chamber is satisfied upon the evidence that members of the Crisis Staff [in Bosanski Samac], including Blagoje Simic as President; the Serb police, including the Chief of Police, Stevan Todorovic, who was also a member of the Crisis Staff; Serb paramilitaries, including ‘Debeli’ (Srcko Radovanovic, ‘Pukovnik’), ‘Crni’ (Dragan Dordevic), ‘Lugar’ (Slobodan Miljkovic), and ‘Laki’ (Predrag Lazarevic); and the 17th Tactical Group of the JNA [Yugoslav Peoples’ Army]; were participants in a joint criminal enterprise, responsible for executing the common plan to persecute non-Serb civilians in the Bosanski Samac Municipality.”

“The Trial Chamber is . . . satisfied that, on a horizontal level, the participants in the joint criminal enterprise acted pursuant to a common plan to set up institutions and authorities to persecute non-Serb civilians in Bosanski Samac Municipality.”

“There is sufficient evidence to conclude that participants in the joint criminal enterprise acted in unison to execute a plan that included the forcible takeover of the town of Bosanski Samac, taking over of vital facilities and institutions in the town, and persecuting non-Serb civilians in the Municipality of Bosanski Samac, within the period set forth in the Amended Indictment. This common plan was aimed at committing persecution against non-Serbs, including acts of unlawful arrest, detention or confinement, cruel and inhumane treatment, deportation and forcible transfer, and the issuance of orders, policies and decisions that violated fundamental rights of non-Serb civilians.”

“Blagoje Simic, as President of the Crisis Staff, was at the apex of the joint criminal enterprise at the municipal level. Blagoje Simic knew that his role and authority were essential for the accomplishment of the common goal of persecution. As the President of the Crisis Staff and later the War Presidency and the Municipal Assembly, he was the highest-ranking civilian in Bosanski Samac Municipality, and the Crisis Staff was responsible for, *inter alia*, the economy, humanitarian and medical care, information and propaganda, procurement of food supplies, and communications. . . . Thus, Blagoje Simic and the Crisis Staff supported the work of the Serb police, paramilitaries, and 17th Tactical Group. The Trial Chamber is convinced that Blagoje Simic and the other participants acted with the shared intent to pursue their common goal.”

But see Simic, Tadic, and Zarić, (Trial Chamber), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, October 17, 2003, paras. 7-9: “I cannot agree with the

finding by the Majority that the 17th Tactical Group of the JNA was involved in the takeover.” “Neither can I agree with the Majority that the takeover was planned and implemented with the purpose of persecuting the non-Serb population.” “I regard the takeover by the Serbs and the disarming of the non-Serbs as a pre-emptive armed operation, justified by avoiding an inter-ethnic bloodshed or even bloodbath. I agree with the Majority that the takeover *per se* did not constitute any crime. The tragedy that followed the takeover was in my view according to the evidence presented at the trial not a result of any previous plan amongst certain individuals.”

(4) second type of joint criminal enterprise—the Omarska camp

(a) *actus reus*

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 2: “The Trial Chamber found that the Omarska camp functioned as a joint criminal enterprise: the atrocities committed therein consisted of a broad mixture of serious crimes committed intentionally in order to persecute and subjugate non-Serbs detained in the camp.”

(i) contributing to the daily operation and maintenance of the Omarska camp furthered the common criminal purpose

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 183, 195-196: “The Trial Chamber found that Omarska camp was a joint criminal enterprise the purpose of which was to persecute and subjugate non-Serb detainees.” “The Appeals Chamber upholds the Trial Chamber’s findings in this regard.”

“The Appeals Chamber observes that the Trial Chamber found that Kvočka had served in the camp from about 29 May 1992 to 23 June 1992 and that he was absent from 2 to 6 June 1992 and from 16 to 19 June 1992; that he held a high-ranking position in the camp and had some degree of authority over the guards; that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely; that he carried out his tasks diligently, participating actively in the running of the camp; that through his own participation, in the eyes of the other participants, he endorsed what was happening in the camp. Kvočka did not show how the Trial Chamber’s findings were unreasonable.”

“It is clear that, through his work in the camp, Kvočka contributed to the daily operation and maintenance of the camp and, in doing so, allowed the system of ill-treatment to perpetuate itself. The Appeals Chamber holds that the Trial Chamber did not make an error of fact when it found that Kvočka allowed the perpetuation of the system of ill-treatment, thereby furthering the common criminal purpose. Consequently, the Appeals Chamber rejects this sub-ground of appeal.”

(ii) lawlessness and anarchy did not prevent finding of joint criminal enterprise

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 412, 413: “Radic contests the Trial Chamber’s finding that the Omarska camp functioned as a joint criminal enterprise. He argues that, according to the Trial Chamber’s findings, anarchy and lawlessness prevailed in the camp.” “The Appeals Chamber has already determined that the systemic form of joint criminal enterprise does not require proof of an agreement between the participants. Radic’s argument as to the lawlessness and anarchy in the camp is inapposite. The existence of the camp and the organization of the guard service required a certain amount of organization. In fact, with regard to the intent of persecution of the non-Serb population of the Prijedor area, the camp functioned with terrible efficiency. The lawlessness and anarchy, referred to by the Trial Chamber, allowed the guards to maltreat the detainees at will.”

(iii) visitor to camp did not participate in a significant way in the functioning of the camp

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 598, 599: “Zigic held no official position in the Omarska camp; he was not even a guard. His participation in the functioning of the camp, as it was established by the Trial Chamber, amounted to several ‘at most ten’ visits to the camp. The evidence before the Trial Chamber allowed the conclusion that on two occasions Zigic participated in the maltreatment of detainees.”

“The Appeals Chamber does not wish to minimize the gravity of the crimes Zigic committed in the camp; they are serious violations of international humanitarian law. On the other hand, . . . [t]he incidents in which Zigic participated, despite their quality of grave crimes, formed only mosaic stones in the general picture of violence and oppression. The Appeals Chamber finds that, in the absence of further evidence of concrete crimes committed by Zigic, no reasonable trier of fact could conclude from the evidence before the Trial Chamber that Zigic participated in a significant way in the functioning of Omarska camp. He cannot be held responsible as a participant in this joint criminal enterprise; his conviction for the crimes committed in this camp ‘in general’ has to be overturned.”

(b) *mens rea*

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 197, 244-246: “The Trial Chamber found that Kvočka participated knowingly, willingly and continuously in the criminal events at Omarska camp, in short that he was aware of the common system of ill-treatment and that he had the intent to discriminate against and persecute the non-Serb detainees.” “The Trial Chamber found the following:

- 1) that living conditions in Omarska camp were harsh and that discriminatory beatings were regularly meted out to the non-Serb detainees;

- 2) that Kvočka worked willingly in Omarska camp for approximately 17 days and left his position only when dismissed by his superiors;
- 3) that he was amply informed of the harsh living conditions and abusive treatment endured by the non-Serbs detainees;
- 4) that he participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service and that he had some degree of authority over the guards;
- 5) that he was in a position to prevent crimes or alleviate suffering but that he did so only on a few occasions;
- 6) that Kvočka was aware of the common criminal purpose which prevailed in the camp;
- 7) that his participation substantially allowed the system and its insidious acts to continue.”

“The Appeals Chamber holds that a trier of fact could reasonably have inferred from these facts that Kvočka shared the intent[³⁸] to further the common criminal purpose. The concentration or detention camp cases have demonstrated repeatedly that such an inference may be drawn when those factors are present.” “In light of the above considerations, the Appeals Chamber upholds the Trial Chamber’s findings that Kvočka contributed to the furtherance of the system of maltreatment of the Omarska camp, with knowledge of the common criminal purpose and intent to further the joint criminal enterprise. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in finding Kvočka guilty as a co-perpetrator of crimes committed as part of the joint criminal enterprise.”

(5) second type of joint criminal enterprise—KP Dom prison complex

Knojelac, (Appeals Chamber), September 17, 2003, paras. 110-111: “The Trial Chamber noted that, by his own admission, Knojelac was warden of the KP Dom [prison complex] from 18 April 1992 until the end of July 1993, that is for 15 months. It found that Knojelac had voluntarily undertaken the position of acting warden and then warden until his departure from the KP Dom and that he retained all powers associated with the pre-conflict position of warden during that period. It was noted above that the Trial Chamber established that, by virtue of his position as prison warden, Knojelac

³⁸ But see “second type (‘systemic’): need to prove personal knowledge of the system of ill-treatment and intent to further that system,” Section (V)(e)(iv)(3), ICTY Digest (suggesting that shared intent may not be the *mens rea* for the second type of joint criminal enterprise).

knew that the non-Serb detainees were being unlawfully detained, had admitted to knowing that they were being detained precisely because they were non-Serbs and knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom. It was also established that he was aware of the intent of the principal offenders – the guards and military authorities – responsible for the living conditions imposed on the non-Serb detainees at the KP Dom, knew that beatings and acts of torture were being carried out and that, by failing to take any appropriate measures which, as warden, he was obliged to adopt, he encouraged his subordinates to maintain those conditions and furthered the commission of those acts.”

“The Appeals Chamber holds that, with regard to Kvojelac’s duties, the time over which he exercised those duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature, a trier of fact should reasonably have inferred from the above findings that he was part of the system and thereby intended to further it. The same conclusion must be reached when determining whether the findings should have led a trier of fact reasonably to conclude that Kvojelac shared the discriminatory intent of the perpetrators of the crimes of imprisonment and inhumane acts.”³⁰

(a) personal situation did not negate finding of *mens rea*

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 230, 232, 233: “Kvočka submits he never had the requisite discriminatory intent, arguing that he is married to a Bosnian Muslim and had close association with non-Serbs even during the war. He argues that he was a member of the moderate Reformist Party of Ante Markovic and that he never showed any intolerance towards other nationals.” “Kvočka replies that his association with the Muslim community, his political affiliation and his duty as a professional policeman are facts that disprove the existence of a discriminatory intent.” “The Appeals Chamber understands that Kvočka contends that the Trial Chamber erred in omitting to consider these circumstances when assessing his *mens rea* and argues that his personal situation was not consistent with the Trial Chamber’s finding that he intended to further the joint criminal enterprise. It would be wrong to consider that the Trial Chamber disregarded the information provided by Kvočka with regard to his so-called ‘personal situation.’ The Appeals Chamber notes that, in a sub-section dealing with Kvočka’s personal background, the Trial Chamber reviewed this evidence and concluded that many witnesses depicted a tolerant and politically moderate man who

³⁰ But see “second type (‘systemic’): need to prove personal knowledge of the system of ill-treatment and intent to further that system,” Section (V)(e)(iv)(3), ICTY Digest (suggesting that shared intent may not be the *mens rea* for the second type of joint criminal enterprise).

was close to the Muslim community, into which he had married. However, in the Appeals Chamber's view, such findings do not preclude a reasonable trier of fact from concluding, in light of all the evidence provided, that the accused intended to further a joint criminal enterprise whose purpose was to persecute the non-Serbs."

(6) third type of joint criminal enterprise—permanent and forcible removal of the majority of Croat and other non-Serb civilians from the so-called Serbian Autonomous District of Krajina (approximately one-third of Croatia)

(a) *actus reus*

Babic, (Trial Chamber), June 29, 2004, paras. 39, 60, 57, 34: "The applicable elements of JCE [joint criminal enterprise] liability . . . are the existence of a plan (i.e. the permanent and forcible removal of non-Serb civilians from the [so-called Serbian Autonomous District of Krajina]) involving a plurality of persons with a variety of functions of greater or lesser degree of importance and the participation of the accused in the common design involving the perpetration of a crime covered by the Statute . . ."

"Babic is charged with having committed the crime of persecution by his participation in a JCE. The JCE, as charged, consisted not only of high political or military leaders but also of known and unknown members of a variety of armed forces, police forces, and state security forces . . ."

"In the geographical areas where the crime of persecution as charged in the Indictment was committed, Babic held political functions at the highest level. Babic admitted that he shared the intent of the other participants of the JCE to remove non-Serb populations from the [so-called Serbian Autonomous District of Krajina] and that he used his central political authority in the top political leadership of the Krajina region to further that purpose. The Trial Chamber finds that his participation in the JCE, as described above, was substantial: Babic instigated and planned SDS [Serbian Democratic Party of Bosnia and Herzegovina] policies to advance the campaign of persecutions against non-Serb populations in the [so-called Serbian Autonomous District of Krajina]; he was instrumental in establishing, supporting, and maintaining the government bodies which ruled the [so-called Serbian Autonomous District of Krajina] and participated in the commission of crimes listed in the Indictment; he assisted in the re-organisation and recruitment of [Territorial Defense] forces which participated in the crimes listed in the Indictment; he provided the financial, material, logistical, and political support for the armed forces involved in the crimes listed in the Indictment; and he made ethnically inflammatory speeches to add to the atmosphere of fear and hatred of non-Serb populations in the [so-called Serbian Autonomous District of Krajina]."

"Babic admitted that the JCE [joint criminal enterprise] came into existence no later than 1 August 1991 and continued until at least June 1992. The objective of the

JCE was the permanent and forcible removal of the majority of Croat and other non-Serb populations from approximately one-third of Croatia through a campaign of persecutions in order to make that territory a Serb-dominated state. The territory consisted of what Serb authorities called the [Serbian Autonomous District of] Krajina, the [Serbian Autonomous District of] Western Slavonia, the [Serbian Autonomous Districts of] Slavonia, Baranja, and Western Srem, and the Dubrovnik Republic.”

See also Babic, (Trial Chamber), June 29, 2004, para. 35: “On the basis of the Factual Statement and other evidence presented to it, the Trial Chamber is satisfied that an armed conflict existed during the times referred to in the Indictment and that the execution of the JCE entailed a widespread or systematic attack directed against a civilian population. Furthermore, the Trial Chamber is satisfied that the execution of the JCE was carried out with discriminatory intent, on political, racial, or religious grounds.”

(b) *mens rea*

Babic, (Appeals Chamber), July 18, 2005, para. 28: “Here, the Appellant admitted that he participated in the joint criminal enterprise with the intent to discriminate on political, racial, or religious grounds, and further admitted not only that crimes including murder were a foreseeable result of the joint criminal enterprise but that he was aware that murders were in fact being committed. Under these circumstances, the Trial Chamber was right to imply that the Appellant’s guilt is not lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the [joint criminal enterprise].”

Babic, (Trial Chamber), June 29, 2004, paras. 38, 40: “The parties seem to consider that Babic’s guilt is lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the JCE.” To the contrary: “Babic voluntarily and intentionally participated in the JCE in pursuit of its criminal objective. Although he claimed not to know about the scale of the crimes of imprisonment, forcible transfer or deportation, and destruction of property, and although he denied wishing the murders listed in the Indictment, there is no doubt that Babic participated in the JCE as a co-perpetrator. Babic did not react appropriately or distance himself from the JCE when he learned about the killings which as he admits were the foreseeable result of the JCE. Babic’s continued participation in the crime of persecution, to the extent described above, displayed an intention to participate in the persecutory acts and awareness that he would incur responsibility for crimes which he came to know about and which were the foreseeable consequence of the implementation of the JCE.”

(7) third type of joint criminal enterprise—crimes in Potocari as a natural and foreseeable consequence of the “Krivaja 95 operation”

Krstic, (Appeals Chamber), April 19, 2004, paras. 239, 147, 151: “The Appeals Chamber concluded that Radislav Krstic willingly participated in the joint criminal enterprise resulting in the humanitarian crisis at Potocari, and was aware that a natural and reasonable consequence of that humanitarian crisis was that crimes would be committed against the civilian population.”

“The ethnic cleansing of the Bosnian Muslim civilians from Srebrenica was part of the Krivaja 95 operation in which Krstic was found to have played a leading role. Radislav Krstic knew that the shelling of Srebrenica would force tens of thousands of Bosnian Muslim civilians into Potocari because of the UN presence there. He was also well aware that there were inadequate facilities at Potocari to accommodate the Bosnian civilians. As such, the Trial Chamber found he was responsible for setting the stage at Potocari for the crimes that followed. Further, from his presence at two meetings convened by General Mladic at the Hotel Fontana he knew that the Bosnian Muslim civilians were in fact facing a humanitarian crisis at Potocari. There was, therefore, sufficient evidence for the Trial Chamber to be satisfied that Radislav Krstic was aware that the Bosnian Muslim civilians at Potocari would be subject to other criminal acts.”

“The responsibility of Radislav Krstic for the crimes committed at Potocari arose from his individual participation in a joint criminal enterprise to forcibly transfer civilians. The opportunistic crimes were natural and foreseeable consequences of that joint criminal enterprise.”

vi) difference between “aiding and abetting,” and “co-perpetration in a joint criminal enterprise” (i.e., acting pursuant to a common design or purpose)

(1) generally

Krvacka et al., (Appeals Chamber), February 28, 2005, para. 92: “The Appeals Chamber notes that the distinction between these two forms of participation [aiding and abetting, and co-perpetration in a joint criminal enterprise] is important, both to accurately describe the crime and to fix an appropriate sentence.”

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 102: “Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility [aiding and abetting, and co-perpetration in a joint criminal enterprise]. . . .”

Limaj et al., (Trial Chamber), November 30, 2005, para. 510: “Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting.” See also *Blaskić*, (Trial Chamber), March 3, 2000, para. 288 (similar); *Furundžija*, (Trial Chamber), December 10, 1998, para. 249 (similar).

The joint criminal enterprise doctrine is discussed in Section (V)(c), ICTY Digest. Aiding and abetting is discussed in Section (V)(d), ICTY Digest.

(2) *actus reus* distinguished

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 89: “The Appeals Chamber notes that in the *Vasiljević* Appeal Judgement, the Appeals Chamber discussed the correct distinction between co-perpetration by means of a joint criminal enterprise and aiding and abetting:

... The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design. ...

See also *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 102 (same).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 33: “[I]n the *Tadić* Appeals Judgement, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a crime and aiding and abetting the commission of a crime.

- (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
- (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.
- (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose. ...

See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 229 (same).

For discussion that a substantial contribution is required for aiding and abetting, see “level of participation for aider and abettor: must have a substantial effect,” Section (V)(e)(iii)(3)(d), ICTY Digest. For discussion that a substantial contribution is not required for a joint criminal enterprise, “level of participation in joint criminal enterprise generally need not be significant or substantial,” Section (V)(e)(iii)(3)(c), ICTY Digest.

(3) *mens rea* distinguished

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 89: “In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.” See also *Vasićević*, (Appeals Chamber), February 25, 2004, para. 102 (same); *Tadić*, (Appeals Chamber), July 15, 1999, para. 229 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 51: “The Appeals Chamber draws attention to the distinction between the mental element required for aiding and abetting and that required for co-perpetration. In the case of aiding and abetting, the requisite mental element is knowledge that the acts committed by the aider and abettor further the perpetration of a specific crime by the principal offender. In the case of co-perpetration, the intent to perpetrate the crime or to pursue the joint criminal purpose must be shown. The Appeals Chamber also recalls that in the *Aleksovski* Appeals Judgement it followed the *Furundžija* Judgement and held that ‘it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that [...] the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.’ The Appeals Chamber also stated that ‘the aider and abettor [must be aware] of the essential elements of the crime committed by the principal (including his relevant *mens rea*).’ The Appeals Chamber notes that no cogent reason was given which would justify this case-law being amended.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 160: “As compared with the requisite *mens rea* for aiding and abetting, [t]he participant in the basic form of joint criminal enterprise must share with the person who physically carried out the crime the state of mind required for that crime; the person who merely aids and abets must be aware of the essential elements of the crime committed, including the state of mind of the person who physically carried it out, but he need not share that state of mind.”

For a more comprehensive discussion of the *mens rea* for the three different types of joint criminal enterprise, see (V)(e)(iv), ICTY Digest. For a discussion of the *mens rea* for aiding and abetting, see (V)(d)(v), ICTY Digest.

(4) distinction depends on the effect of the assistance and on the knowledge of the accused

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 90: “Applying the *Vasiljević* definition, the Appeals Chamber considers that whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused. . . . Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 510 (similar).

(5) when an aider or abettor becomes a co-perpetrator

Kvočka et al., (Trial Chamber), November 2, 2001, paras. 284-285: “Eventually, an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator. When . . . an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator.” “Once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator.”

(6) responsibility of an aider and abettor is less than a participant in a joint criminal enterprise

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 92: “Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.”

Vasiljević, (Appeals Chamber), February 25, 2004, para. 102: “The participant [in a joint criminal enterprise] is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by

several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution."

Brđjanin, (Trial Chamber), September 1, 2004, para. 274: "The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability *vis-à-vis* that of an accused acting pursuant to a [joint criminal enterprise] who does share the intent of the principal offender."

Krnjelac, (Trial Chamber), March 15, 2002, para. 75: "The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a joint criminal enterprise with the principal offender must share that intent."

(7) distinguishing a co-perpetrator from an aider and abettor of torture

Furundžija, (Appeals Chamber), July 21, 2000, para. 118: "[T]wo types of liability for criminal participation 'appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.' [T]o distinguish a co-perpetrator from an aider or abettor, 'it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person).' [T]o be convicted as a co-perpetrator, the accused 'must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.'" (emphasis in original)

Furundžija, (Trial Chamber), December 10, 1998, para. 257: "(i) [T]o be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person. (ii) [T]o be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."

(8) application—difference between aiding and abetting genocide at Srebrenica and responsibility as a participant in a joint criminal enterprise

Krstić, (Appeals Chamber), April 19, 2004, para. 131: “The Trial Chamber . . . made numerous findings that militate against a conclusion that Radislav Krstić had genocidal intent. It found that although Krstić was not a reluctant participant in the forcible transfer of the Bosnian Muslim population, he did appear concerned to ensure that the operation was conducted in an orderly fashion. He simply wanted the civilian population out of the area and he had no interest in mistreating them along the way. The Trial Chamber acknowledged, moreover, that the evidence could not establish that ‘Radislav Krstić himself ever envisaged that the chosen method of removing the Bosnian Muslims from the enclave would be to systematically execute part of the civilian population’ and that he ‘appeared as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July 1995.’ The Trial Chamber found that ‘left to his own devices, it seems doubtful that Krstić would have been associated with such a plan at all.’” “The Trial Chamber also found that Radislav Krstić made efforts to ensure the safety of the Bosnian Muslim civilians transported out of Potocari.”

“As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS [Army of Republika Srpska] Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.”

“[T]he Trial Chamber’s conviction of Krstić as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead.”

But see Krstić, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 73-75 (Krstić should have been held responsible as a participant in a joint criminal enterprise).

vii) whether one may aid and abet a joint criminal enterprise

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 91: “The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is

not a crime in itself. Therefore, it would be inaccurate to refer to aiding and abetting a joint criminal enterprise. The aider and abettor assists the principal perpetrator or perpetrators in committing the crime.”

But see Vasiljevic, (Appeals Chamber), February 25, 2004, para. 142: Under the heading “Aiding and abetting the joint criminal enterprise of persecution,” the Appeals Chamber stated: “In order to convict [Vasiljevic] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that the Appellant had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate against the Muslim population, and that, with that knowledge, the Appellant made a substantial contribution to the commission of the discriminatory acts by the principal perpetrators.” *See also Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 160 (“A joint criminal enterprise may be aided and abetted, where it is demonstrated that the aider and abettor knew the shared intent of the participants in the joint criminal enterprise.”); *Kracka et al.*, (Trial Chamber), November 2, 2001, paras. 271, 284, 285 (“[L]iability on the basis of a joint criminal enterprise requires a knowing assistance or encouragement for an aider or abettor. . . .” “[A]n aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise.” “An aider or abettor need not necessarily share the intent of the co-perpetrators.” “Depending on the level and nature of participation, the accused is either an aider and abettor or a co-perpetrator of the criminal enterprise.”).

(a) application—murder at the Drina River, municipality of Visegrad, south-eastern Bosnia and Herzegovina

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 1, 143: The Trial Chamber found that on June 7, 1992, the Appellant, together with Milan Lukic and two unidentified men, forcibly transported seven Muslim men to the eastern bank of the Drina River, where they were shot. Five of the seven men died as a result of the shooting and two survived by falling into the river, pretending to be dead. This incident is referred to as the Drina River incident.

Under the heading of “aiding and abetting the joint criminal enterprise of persecution,” the Appeals Chamber stated: “In the Appeals Chamber’s view, it is beyond doubt that the acts committed by Milan Lukic and the two other men amount to the crime of persecution: They killed the five Muslim men and committed inhumane acts against the two survivors with the deliberate intent to discriminate on religious or political grounds. Furthermore, the Appeals Chamber concurs with the findings of the Trial Chamber that the Appellant participated in the Drina River incident ‘with full awareness that the intent of the Milan Lukic’s group was to persecute the local Muslim population of Visegrad through the commission of the underlying crimes.’ The only reason why the seven Muslim men were arrested and killed was because of their

belonging to the Muslim population of Visegrad. The Appellant was aware of these facts and he willingly participated in the Drina River incident by pointing his gun at the victims and preventing them from fleeing. Even if it has not been established beyond reasonable doubt that he personally killed the five Muslim men, his support had a substantial effect upon the perpetration of the crimes on the bank of the Drina River. He was at that time fully aware that his participation assisted the commission of the crime of persecution by the principal perpetrators [of the joint criminal enterprise]. The Appellant is therefore responsible for having aided and abetted the crime of persecution by way of murder of the five Muslim men and of inhumane acts against the two other Muslim men”

For findings that Vasiljevic was not responsible for his role in the killings as a co-perpetrator in a joint criminal enterprise, see “application—inferring intent for first type joint criminal enterprise: murder at the Drina River, municipality of Visegrad, south-eastern Bosnia and Herzegovina—intent not properly inferred,” Section (V)(e)(iv)(2)(c), ICTY Digest.

viii) whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability

Krstic, (Trial Chamber), August 2, 2001, paras. 642-643: “In the *Tadic* Appeal Judgement, the Appeals Chamber referred to ‘the notion of common design as a form of accomplice liability,’ a phrase upon which Trial Chamber II subsequently relied to distinguish ‘committing’ from ‘common purpose liability’ under Article 7(1). [T]his Trial Chamber views the comment in the *Tadic* Appeal Judgement as not part of the *ratio decidendi* of that Judgement and does not believe that *Tadic* characterisation means that any involvement in a joint criminal enterprise automatically relegates the liability of an accused to that of ‘complicity in genocide’ in Article 4(3)(e). . . . [This] Trial Chamber sees no basis for refusing to accord the status of a co-perpetrator to a member of a joint genocidal enterprise whose participation is of an extremely significant nature and at the leadership level.” “It seems clear that ‘accomplice liability’ denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators. The Trial Chamber is of the view that this distinction coincides with that between ‘genocide’ and ‘complicity in genocide’ in Article 4(3). The question comes down to whether . . . a participant in the criminal enterprise may be most accurately characterised as a direct or principal perpetrator or as a secondary figure in the traditional role of an accomplice.”

But see Krmjelac, (Trial Chamber), March 15, 2002, para. 77: “This Trial Chamber . . . does not . . . accept the validity of the distinction which Trial Chamber I [*Krstic*] has sought to draw between a co-perpetrator and an accomplice. This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadic*, that the liability of the

participant in a joint criminal enterprise who was not the principal offender is that of an accomplice.”

VI) COMMAND RESPONSIBILITY (ARTICLE 7(3))

a) Statute

ICTY Statute, Article 7(3):

“The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

b) Generally

i) command responsibility is customary international law

Delalic et al., (Appeals Chamber), February 20, 2001, para. 195: “The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.” *See also* *Brdjanin*, (Trial Chamber), September 1, 2004, para. 275 (quoting same); *Stakic*, (Trial Chamber), July 31, 2003, para. 458 (quoting same).

Limaj et al., (Trial Chamber), November 30, 2005, para. 519: “The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law . . .” *See also* *Halilovic*, (Trial Chamber), November 16, 2005, para. 55 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 357 (similar).⁴⁰

ii) command responsibility applies to all acts covered in Articles 2-5

Halilovic, (Trial Chamber), November 16, 2005, para. 55: “Article 7(3) of the Statute is applicable to all acts referred to in Articles 2 to 5 thereof . . .”

⁴⁰ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent *or* punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

iii) command responsibility applies in both international and internal armed conflicts

Limaj et al., (Trial Chamber), November 30, 2005, para. 519: “The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is . . . applicable to both international and internal armed conflicts.” *See also Halilovic*, (Trial Chamber), November 16, 2005, para. 55 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 357 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 275 (similar).⁴¹

iv) purpose behind command responsibility

Halilovic, (Trial Chamber), November 16, 2005, para. 39: “The Trial Chamber recalls that the purpose behind the concept of command responsibility is to ensure compliance with the laws and customs of war and international humanitarian law generally. The principle of command responsibility may be seen in part to arise from one of the basic principles of international humanitarian law aiming at ensuring protection for protected categories of persons and objects during armed conflicts. This protection is at the very heart of international humanitarian law. Ensuring this protection requires, in the first place, preventative measures which commanders are in a position to take, by virtue of the effective control which they have over their subordinates, thereby ensuring the enforcement of international humanitarian law in armed conflict. A commander who possesses effective control over the actions of his subordinates is duty bound to ensure that they act within the dictates of international humanitarian law and that the laws and customs of war are therefore respected.”

Obrenovic, (Trial Chamber), December 10, 2003, para. 100: “The Trial Chamber recalls . . . the purpose behind the doctrine of command responsibility: to ensure compliance with the laws and customs of war and international humanitarian law generally.”

v) history—duty of responsible command

Halilovic, (Trial Chamber), November 16, 2005, paras. 40, 41: “The elements of command responsibility are derived from the duties comprised in responsible command, and those duties are generally enforced through command responsibility. For many years the responsibility of commanders for the conduct of their troops has been

⁴¹ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent or punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

recognised in domestic jurisdictions. The concept of responsible command can be seen in the earliest modern codifications of the laws of war. It was incorporated in the 1899 Hague Convention with Respect to the Laws and Customs of War on Land. It was also reproduced in Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 which states:

The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following criteria:

To be commanded by a person responsible for his subordinates[...].”

“It was only in the aftermath of the Second World War that the concept of command responsibility for failure to act received its first judicial recognition in an international context. This form of responsibility by omission was formally recognised by Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949. Article 86 of Additional Protocol I affirms this form of responsibility, the basis for which is the duty placed on commanders by Article 87 of the same Protocol to preclude violations of the Geneva Conventions and their Additional Protocols.”

For the history of the development of command responsibility in international law, see *Halilović*, (Trial Chamber), November 16, 2005, paras. 42–49.

For discussion of “deterrence relevant to commanders,” see Section (IX)(c)(ii)(2)(d)(v), ICTY Digest.

vi) responsibility attaches to a commander for dereliction of duty

Krnjelac, (Appeals Chamber), September 17, 2003, para. 171: “It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.”

Halilović, (Trial Chamber), November 16, 2005, para. 38: “It is clear that the form of responsibility set out in Article 7(3) of the Statute is based upon the duty of superiors to act, which consists of a duty to prevent and a duty to punish criminal acts of their subordinates.”

See also Halilović, (Trial Chamber), November 16, 2005, paras. 50, 53, 54 (discussing whether liability attaches to a commander for the crimes of his subordinates or for dereliction of duty).

For discussion of the duty to prevent and to punish, see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest.

See also “superior responsibility may not be based on strict liability,” Section (VI)(c)(ii)(7), ICTY Digest.

vii) distinguishing responsibility under Article 7(1) and Article 7(3)

Blaskić, (Appeals Chamber), July 29, 2004, para. 664: “The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior’s intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.”

Obrenović, (Trial Chamber), December 10, 2003, para. 100: “When a commander fails to ensure compliance with the principles of international humanitarian law such that he fails to prevent or punish his subordinates for the commission of crimes that he knew or had reason to know about, he will be held liable pursuant to Article 7(3). When a commander orders his subordinates to commit a crime within the jurisdiction of the Tribunal, he will be held liable pursuant to Article 7(1) of the Statute.”⁴²

Galic (Trial Chamber), December 5, 2003, para. 169: “[A] superior may be found responsible under Article 7(1) where the superior’s conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) . . . the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior’s disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior’s liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior’s conduct. In such cases the subordinate will most likely be aware of the superior’s support or encouragement,

⁴² There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent *or* punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

although that is not strictly necessary. In the Majority's view, the key point in all of this is that a superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions or apparent omissions or understated participation or any mixture of overt and non-overt actions, where the effect of such conduct is to commission crimes by subordinates."

See discussion of omissions generally under Article 7(1), (V)(c)(vi), ICTY Digest.

For discussion of "pleading Article 7(3)," see (X)(b)(ix)(13), ICTY Digest.

c) Elements

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 839: "The elements [required for responsibility under Article 7(3) of the Statute] are:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof."

See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 827 (similar); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 484 (same elements); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 520 (same elements); *Hadžović*, (Trial Chamber), November 16, 2005, para. 56 (same elements); *Strugar*, (Trial Chamber), January 31, 2005, para. 358 (same elements); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 275 (same elements); *Galic*, (Trial Chamber), December 5, 2003, para. 173 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 457 (same elements); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 401 (similar); *Blaskic*, (Trial Chamber), March 3, 2000, para. 294 (same elements); *Delalić et al.*, (Trial Chamber), November 16, 1998, para. 346 (same elements). See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 790 (the elements are customary international law).

For discussion of the third element, and, particularly, that where measures to prevent a crime are insufficient there is also a duty to punish, see "the failure of the superior to take the necessary and reasonable measures to prevent and/or punish," see Section (VI)(c)(iii), ICTY Digest.

i) the existence of a superior-subordinate relationship (element 1)

Limaj et al., (Trial Chamber), November 30, 2005, para. 521: "The superior-subordinate relationship lies in the very heart of the doctrine of a commander's liability for the crimes committed by his subordinates." See also *Strugar*, (Trial Chamber), January 31, 2005, para. 359 (similar).

See *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 839 (requiring “the existence of a superior-subordinate relationship”); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 484 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 520 (same); *Halilović*, (Trial Chamber), November 16, 2005, para. 56 (same); *Strugar*, (Trial Chamber), January 31, 2005, para. 358 (same); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 275 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 457 (same); *Kunarac, Kovac, and Vukojević*, (Trial Chamber), February 22, 2001, para. 396; *Blaskić*, (Trial Chamber), March 3, 2000, para. 294 (same); *Delalić et al.*, (Trial Chamber), November 16, 1998, para. 346 (same).

(1) the superior-subordinate relationship is based on the power to control the actions of subordinates

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 840: “The basis of the superior-subordinate relationship is the power of the superior to control the actions of his subordinates.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 521: “It is the position of command over and the power to control the acts of the perpetrator which forms the legal basis for the superior’s duty to act, and for his corollary liability for a failure to do so.” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 57 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 359 (similar).

Halilović, (Trial Chamber), November 16, 2005, para. 58: “The main factor in determining a position of command is the ‘actual possession or non-possession of powers of control over the actions of subordinates.’” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 360 (similar).

(2) effective control required

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 840: “The *Celebici* [a/k/a *Delalić*] Trial Chamber concluded that:

it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law”

Blaskić, (Appeals Chamber), July 29, 2004, para. 375: “It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 791 (“the superior [must have] ‘effective control’ over the person or persons in question, namely those persons committing the offences.”); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 276 (“the superior’s effective control . . . must be

established.”); *Galic*, (Trial Chamber), December 5, 2003, para. 173 (“control must be effective for there to be a relevant relationship of superior to subordinate.”); *Stakić*, (Trial Chamber), July 31, 2003, para. 459.

Delalić, et al., (Appeals Chamber), February 20, 2001, para. 197: “In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.”

Blaskić, (Trial Chamber), March 3, 2000, para. 335: A “superior” is “a person exercising ‘effective control’ over his subordinates.”

(3) effective control measured by the ability to prevent and/or punish the crimes

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 840: “The *Celebić* [a/k/a *Delalić*] Trial Chamber concluded that:

it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent *and* punish the commission of these offences.” (emphasis added)

Blaskić, (Appeals Chamber), July 29, 2004, para. 484 (referring to “the material ability to prevent *and* punish the commission of crimes”) (emphasis added); *Halilović*, (Trial Chamber), November 16, 2005, para. 58 (same); *Blaskić*, (Trial Chamber), March 3, 2000, para. 300 (same).⁴³

Compare Blaskić, (Appeals Chamber), July 29, 2004, para. 375: “The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent *or* punish criminal conduct.” (emphasis added) *See also Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 256 (“The concept of effective control over a subordinate - in the sense of a material ability to prevent *or* punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.”) (emphasis added); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 522 (“In

⁴³ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent *or* punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

determining the degree of control to be exercised by the superior over the subordinate, the Appeals Chamber endorsed the effective control standard, as the material ability to prevent *or* punish criminal conduct.”) (emphasis added); see also *Strugar*, (Trial Chamber), January 31, 2005, para. 360 (similar to *Limaj*); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 791 (“Effective control means the ‘material ability to prevent *or* punish the commission of the offences.’”) (emphasis added); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 276 (similar to *Blagojević*); *Stakić*, (Trial Chamber), July 31, 2003, para. 459 (similar similar to *Blagojević*); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 416 (“[O]nly those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control *or* punish the acts of subordinates may incur criminal responsibility.”) (emphasis added)

See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 511: “[T]he Appeals Chamber finds that the Appellant had effective control to the extent that he had the ability to report subordinates’ acts to his superiors.”

(4) may be *de jure* or *de facto* power to control

Delalić et al., (Appeals Chamber), February 20, 2001, paras. 192-193: “Under Article 7(3), a commander or superior is . . . the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate’s crime or to punish the perpetrators of the crime after the crime is committed.” “The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto.”⁴⁴

Limaj et al., (Trial Chamber), November 30, 2005, para. 522: “The existence of the position of command may arise from the formal or *de jure* status of a superior, or from the existence of *de facto* powers of control. It derives essentially from the ‘actual possession or non-possession of powers of control over the actions of subordinates.’”

⁴⁴ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent *or* punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

Halilović, (Trial Chamber), November 16, 2005, para. 60: “The jurisprudence of the Tribunal has interpreted the concepts of command and subordination in a relatively broad sense. Command does not arise solely from the superior’s formal or *de jure* status, but can also be based on the existence of *de facto* powers of control.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 362 (similar).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 791: “The hierarchical relationship [between the superior and subordinate] may exist by virtue of a person’s *de jure* or *de facto* position of authority.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 276 (same); *Galić*, (Trial Chamber), December 5, 2003, para. 173 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 459 (same); *Blaskić*, (Trial Chamber), March 3, 2000, para. 300 (similar).

Kumarac, Kovac, and Vuković, (Trial Chamber), February 22, 2001, para. 396: “[A] [superior-subordinate] relationship cannot be determined by reference to formal status alone. Accordingly, formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person’s *de facto*, as well as *de jure*, position as a commander.”

Aleksovski, (Trial Chamber), June 25, 1999, para. 76: “Superior responsibility is thus not reserved for official authorities. Any person acting *de facto* as a superior may be held responsible under Article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused’s formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control. “[T]he factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. [F]ormal designation as a commander should not be considered to be a necessary prerequisite for superior responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander.”

(a) *de jure* authority without effective control insufficient

Delalić, et al., (Appeals Chamber), February 20, 2001, para. 197: “In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.” See also *Galić*, (Trial Chamber), December 5, 2003, para. 173 (quoting same).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 791: “A commander vested with *de jure* authority who does not, in reality, have effective control over his or her subordinates would not incur criminal responsibility pursuant to the doctrine of

command responsibility. . . .” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 276 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 459 (similar).

(b) *de facto* authority with effective control sufficient

Delalić et al., (Appeals Chamber), February 20, 2001, paras. 194, 197: “[W]hereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.”

“The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 791: “[A] *de facto* commander who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 276 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 459 (similar).

Blaskić, (Trial Chamber), March 3, 2000, para. 302: “Although . . . ‘actual ability’ of a commander is a relevant criterion, the commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.”⁴⁵

(c) degree of *de facto* authority must be equivalent to *de jure* authority

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 416: “The Appeals Chamber [in *Delalić et al.*] found that the degree of *de facto* authority or powers of control required under the doctrine of superior responsibility is equivalent to that required based upon *de*

⁴⁵ There are both cases discussing the ability to prevent and punish as a means to judge effective control, and cases discussing the ability to prevent or punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

jure authority: ‘Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts.’” *See also Delalic, et al.*, (Appeals Chamber), February 20, 2001, para. 197 (same language as quoted).

**(d) substantial influence that is short of effective control
insufficient**

Halilovic, (Trial Chamber), November 16, 2005, para. 59: “A degree of control which falls short of the threshold of effective control is insufficient for liability to attach under Article 7(3). ‘Substantial influence’ over subordinates which does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising command responsibility and, therefore, to impose criminal liability.” *See also Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 791 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 276 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 459 (same as *Brđjanin*).

(e) factors to assess for determining effective control

Blaskic, (Appeals Chamber), July 29, 2004, para. 69: “[T]he indicators of effective control . . . are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate” *See also Halilovic*, (Trial Chamber), November 16, 2005, para. 58 (quoting same).

Halilovic, (Trial Chamber), November 16, 2005, para. 58: “[F]actors indicative of an accused’s position of authority and effective control may include the official position held by the accused, his capacity to issue orders, whether *de jure* or *de facto*, the procedure for appointment, the position of the accused within the military or political structure and the actual tasks that he performed.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, paras. 419-424: “A starting point will be the official position held by the accused. Actual authority however will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused.” “A formal position of authority may be determined by reference to official appointment or formal grant of authority.” “The capacity to sign orders will be indicative of some authority. The authority to issue orders, however, may be assumed *de facto*.” “A superior status, when not clearly spelled out in an appointment order, may be deduced though an analysis of the actual tasks performed by the accused in question.”

Blaskic, (Trial Chamber), March 3, 2000, para. 302: “What counts is [the superior’s] material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.”

(i) the giving of orders or exercise of powers generally attached to a military command are strong indications of command

Blaskic (Appeals Chamber), July 29, 2004, para. 69: “The Appeals Chamber . . . notes the Appellant’s argument that to establish that effective control existed at the time of the commission of subordinates’ crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander.”

Kunarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 397: “The giving of orders or the exercise of powers generally attached to a military command are strong indications that an individual is indeed a commander. But these are not the sole relevant factors.”

Compare Blaskic, (Appeals Chamber), July 29, 2004, para. 485: “As the Appellant has conceded, he had *de jure* command over regular [Croatian Defence Council (army of the Bosnian Croats)] units in the [Central Bosnia Operative Zone], sometimes with special units such as the Vitezovi attached to his command. His authority entitled him to issue orders, including . . . humanitarian ones However, the Appeals Chamber considers that the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders.”

(5) relationship most obviously characterized by a formal hierarchical relationship

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 791: “The existence of a superior-subordinate relationship is most obviously characterised by a formal hierarchical relationship between the superior and subordinate. . . .” *See also Brijanin*, (Trial Chamber), September 1, 2004, para. 276 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 459 (similar).

(6) relationship to subordinates may be direct or indirect

Blaskic, (Appeals Chamber), July 29, 2004, para. 67: “The Trial Chamber . . . stated that ‘a commander may incur criminal responsibility for crimes *committed* by persons who are

not formally his (direct) subordinates, insofar as he exercises effective control over them.’ [This conclusion] of the Trial Chamber fall[s] within the terms of Article 7(3) of the Statute, and [is] not challenged by the Appellant.” (emphasis in original)

Delalić et al., (Appeals Chamber), February 20, 2001, paras. 251, 252: The Trial Chamber found that “the superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner, with the result that the superior-subordinate relationship itself may be both direct and indirect.” “The Appeals Chamber regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established.”

Halilović, (Trial Chamber), November 16, 2005, para. 60: “[T]he necessity to establish the existence of a hierarchical relationship between the superior and the subordinate does ‘not [...] import a requirement of *direct* or *formal* subordination.’” (emphasis in original) *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 522 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 362 (similar).

Halilović, (Trial Chamber), November 16, 2005, para. 63: “[T]here is no requirement that the superior-subordinate relationship be direct or immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior’s effective control over the subordinate, whether that subordinate is immediately answerable to that superior or more remotely under his command.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 791: “[A] hierarchical relationship [between superior and subordinate] may also . . . arise out of an informal and indirect relationship.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 276 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 459 (same as *Brđjanin*).

Blaskić, (Trial Chamber), March 3, 2000, para. 301: “[A] commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.”

(a) includes a subordinate two levels down in the chain of command

Strugar, (Trial Chamber), January 31, 2005, paras. 361, 363-366: “In the present case, the issue is raised whether a commander may be found responsible for the crime committed by a subordinate two levels down in the chain of command.” “[O]ther persuasive sources seem to indicate that there is no requirement that the superior-subordinate relationship be immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior’s effective control over the subordinate, whether that subordinate be immediately answerable to that

superior or more remotely under his command. The Chamber refers to the [International Committee of the Red Cross] Commentary dealing with the concept of a 'superior' within the meaning of Article 86 of Additional Protocol I, the provision on which Article 7(3) of the Statute is based, which emphasises that the term does not only cover immediate superiors. Again, the issue is seen as one of control rather than formal direct subordination." "Further support can be found in the judgement of the military tribunal in the case against the Japanese Admiral Soemu Toyoda tried in the aftermath of World War II. . . ." "Reference may also be made to the Commentary of the International Law Commission on Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind . . ." In this respect, the Chamber also recalls that 'the test of effective control . . . implies that more than one person may be held responsible for the same crime committed by a subordinate.'"

"In light of the above, the Chamber holds that there is no legal requirement that the superior-subordinate relationship be a direct or immediate one for a superior to be found liable for a crime committed by a subordinate, provided that the former had effective control over the acts of the latter."

(7) relationship may include command of informal structures/ need not be formalized

Delalic et al., (Appeals Chamber), February 20, 2001, para. 254: "The requirement of the existence of a "superior-subordinate relationship" which, in the words of the Commentary to Additional Protocol I [to the Geneva Conventions], should be seen "in terms of a hierarchy encompassing the concept of control," is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined. It is the Trial Chamber's conclusion . . . that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so."

Delalic et al., (Appeals Chamber), February 20, 2001, para. 193: "Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment."

Brđjanin, (Trial Chamber), September 1, 2004, para. 276: "The superior-subordinate relationship need not have been formalised or necessarily determined by formal status alone." *See also Stakic*, (Trial Chamber), July 31, 2003, para. 459 (same).

Kumarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 397: “The relationship between the commander and his subordinates need not have been formalized; a tacit or implicit understanding between them as to their positioning *vis-à-vis* one another is sufficient.”

(8) temporary nature of military unit does not exclude relationship

Halilovic, (Trial Chamber), November 16, 2005, para. 61: “Command responsibility applies to every commander at every level in the armed forces. This includes responsibility for troops who have been temporarily assigned to that commander. Article 87(1) of Additional Protocol I [to the Geneva Conventions] states that the duty of commanders applies ‘to the armed forces under their command and other persons under their control.’ The [International Committee of the Red Cross] Commentary to Article 87(1) provides;

A commander may, for a particular operation and for a limited period of time, be supplied with reinforcements consisting of troops who are not normally under his command. He must ensure that these members of the armed forces comply with the Conventions and the Protocol as long as they remain under his command.”

Halilovic, (Trial Chamber), November 16, 2005, para. 61: “To hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts charged in the indictment were committed, these troops were under the effective control of that commander.” *See also Kumarac, Kovac, and Vukovic*, (Trial Chamber), February 22, 2001, para. 399 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 362: “[I]here is no requirement that the relationship between the superior and the subordinate be permanent in nature. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 522 (same first sentence).

Kumarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 399: “Both those permanently under an individual’s command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander.”

(9) a superior who has effective control but fails to exercise it can be held responsible

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 791: “Where a commander has effective control and fails to exercise that power he can be held responsible for the crimes committed by his subordinates.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 459 (same).

(10) more than one superior may be held responsible

Limaj et al., (Trial Chamber), November 30, 2005, para. 522: “[T]he Chamber recalls that ‘the test of effective control [...] implies that more than one person may be held responsible for the same crime committed by a subordinate.’” *See also Halilović*, (Trial Chamber), November 16, 2005, para. 62 (similar); *Blaskić*, (Trial Chamber), March 3, 2000, para. 303 (same quoted language).

Krnjelac, (Trial Chamber), March 15, 2002, para. 93: “Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.”

See also Blaskić, (Appeals Chamber), Partial Dissenting Opinion of Judge Weinberg de Roca, July 29, 2004, paras. 40-41: “The Appeals Chamber notes that some of the additional evidence points to the participation of other leaders in planning and ordering the attack on the Ahmici area [in Central Bosnia-Herzegovina] on 16 April 1993. . . .” “[T]his inquiry is misconceived. There is no legal requirement that a person giving orders be a sole decision-maker or be the highest or only person in a chain of command. It is entirely possible that a commander, who is himself acting on the orders of a hierarchical superior, or who is acting in concert with, or at the behest of other political or military leaders, may nevertheless be criminally responsible for ordering crimes.”

(11) analyze authority on a case-by-case basis

Blaskić (Appeals Chamber), July 29, 2004, para. 69: “The indicators of effective control are more a matter of evidence than of substantive law” *See also Halilović*, (Trial Chamber), November 16, 2005, para. 58 (quoting same).

Halilović, (Trial Chamber), November 16, 2005, para. 63: “As to whether the superior has the requisite level of control, this is a matter which must be determined on the basis of the evidence presented in each case.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 366 (similar).

Brdjanin, (Trial Chamber), September 1, 2004, para. 277: “In all circumstances, and especially when an accused is alleged to have been a member of collective bodies with authority shared among various members, ‘it is appropriate to assess on a case-by-case basis the power or authority actually devolved on an accused,’ taking into account the cumulative effect of the accused’s various functions.”

(12) application to civilian leaders

(a) command responsibility applies to civilian leaders

Brdjanin, (Trial Chamber), September 1, 2004, para. 281: “Article 7(3) is applicable both to military and civilian leaders, be they elected or self-proclaimed”

Stakić, (Trial Chamber), July 31, 2003, para. 462: “Pursuant to Article 7(3) of the Statute and following jurisprudence of this Tribunal, a civilian superior may be held criminally responsible for the crimes of his subordinates.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 459 (similar).

Delalić et al., (Trial Chamber), November 16, 1998, para. 377: “[I]t is . . . the Trial Chamber’s conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority. . . .”

(b) need superior-subordinate relationship

Brdjanin, (Trial Chamber), September 1, 2004, para. 281: “As in the case of military superiors, civilian superiors will only be held liable under the doctrine of superior criminal responsibility if they were part of a superior-subordinate relationship, even if that relationship is an indirect one.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 416: “[A] government official will only be held liable under the doctrine of command responsibility if he was part of a superior-subordinate relationship, even if that relationship is an indirect one.”

(c) need effective power to control the perpetrators

Brdjanin, (Trial Chamber), September 1, 2004, para. 281: It must be “established that [the civilian leaders] had the requisite effective control over their subordinates.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 415: “While civilians occupying positions of authority in relation to a portion of a territory may be held responsible under the principle of superior responsibility, they will incur criminal responsibility only if they are found to possess the necessary powers of control over the actual perpetrators.”

Delalić et al., (Trial Chamber), November 16, 1998, para. 378: “[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.”

See also Brđjanin, (Trial Chamber), September 1, 2004, para. 281: “In situations of armed conflict, it is often the case that civilian superiors assume more power than that with which they are officially vested. In such circumstances, *de facto* authority may exist alongside, and may turn out to be more significant than, *de jure* authority. The capacity to sign orders will be indicative of some authority; it is necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon.”

(d) influence is insufficient

Brđjanin, (Trial Chamber), September 1, 2004, para. 281: “A showing that the superior merely was an influential person will not be sufficient; however, it will be taken into consideration, together with other relevant facts, when assessing the civilian superior’s position of authority.”

Kordić and Čerkez, (Trial Chamber), February 26, 2001, para. 416: “Even though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. A showing that the official merely was generally an influential person will not be sufficient.”⁴⁶

(e) disciplinary power to be interpreted broadly

Brđjanin, (Trial Chamber), September 1, 2004, para. 281: “[T]he concept of effective control for civilian superiors is different in that a civilian superior’s sanctioning power must be interpreted broadly. It cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position. For a finding that civilian superiors have effective control

⁴⁶ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent or punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.” *See also Aleksovski*, (Trial Chamber), June 25, 1999, para. 78 (similar).

(f) only applies where degree of control is similar to that of military commanders

Delalic et al., (Trial Chamber), November 16, 1998, para. 378: “[T]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.”

Compare Brdjanin, (Trial Chamber), September 1, 2004, para. 281: “It cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position.”

(13) application—the superior-subordinate relationship

(a) command responsibility for JNA (Yugoslav Peoples’ Army) forces involved in the attack on Srd and the shelling of Dubrovnik, including the Old Town

Strugar, (Trial Chamber), January 31, 2005, paras. 391, 414: “[O]n 6 December 1991 the 3/472 mtbr [Third Battalion of the 472nd Motorised Brigade], the 3/5 mtbr [Third Battalion of the 5th Motorised Brigade], and the 107 OAG [107th Coastal Artillery Group], among other units, were directly subordinated to the 9 VPS [Ninth Military Naval Sector], which was subordinated to the 2 OG [Second Operational Group of the JNA (Yugoslav Peoples’ Army/Army of the Socialist Federal Republic of Yugoslavia)]. The 3/472 mtbr, the 3/5 mtbr and the 107 OAG were at the second level of subordination to the 2 OG. The Chamber is satisfied, therefore, and finds that the Accused, as the commander of the 2 OG, had *de jure* authority over the JNA [Yugoslav Peoples’ Army] forces involved in the attack on Srd and the shelling of Dubrovnik, including the Old Town.” “[T]he Chamber is satisfied that as the commander of the 2 OG the Accused had effective control over the perpetrators of the unlawful attack on the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to issue orders to the 3/472 mtbr, and all the other JNA [Yugoslav Peoples’ Army] forces involved in the attack on Srd and the shelling of Dubrovnik, including the Old Town, explicitly prohibiting an attack on the Old Town, as well as to take other measures to ensure compliance with such orders and to secure that the Old Town would not be attacked by shelling, or that an existing attack be immediately terminated. Further, the Chamber is satisfied that following the attack of

6 December 1991 the Accused had the legal authority and the material ability to initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town.”

**(b) command responsibility for the Sarajevo Romanija Corps
troops deployed around Sarajevo**

Galic, (Trial Chamber), December 5, 2003, paras. 613, 659-663: “General Galic admits that he was the ‘*de jure* and *de facto*’ commander’ of the [Sarajevo Romanija Corps] troops deployed around Sarajevo”

“The Trial Chamber has no doubt that General Galic was an efficient and professional military officer. Upon his appointment, he finalised the composition and organisation of the [Sarajevo Romanija Corps]. General Galic gave the impression to his staff and to international personnel that he was in control of the situation in Sarajevo.”

“General Galic was present on the battlefield of Sarajevo throughout the Indictment Period [from around 10 September 1992 to 10 August 1994], in close proximity to the confrontation lines, which remained relatively static, and he actively monitored the situation in Sarajevo. General Galic was perfectly cognisant of the situation in the battlefield of Sarajevo. The Trial Record demonstrates that the [Sarajevo Romanija Corps] reporting and monitoring systems were functioning normally. General Galic was in a good position to instruct and order his troops, in particular during the Corps briefings. Many witnesses called by the Defence gave evidence in relation to the fact that the orders went down the chain of command normally. They recalled in particular that orders were usually given in an oral form, the communication system of the [Sarajevo Romanija Corps] being good.”

“There is a plethora of evidence from many international military personnel that the [Sarajevo Romanija Corps] personnel was competent, and under that degree of control by the chain of command which typifies well-regulated armies. That personnel concluded that both sniping and shelling activity by the [Sarajevo Romanija Corps] was under strict control by the chain of command from observation of co-ordinated military attacks launched in the city of Sarajevo in a timely manner, of the speedy implementation of cease-fire agreements, of threats of attacks followed by effect, or of the type of weaponry used. The Trial Chamber is convinced that the [Sarajevo Romanija Corps] personnel was under normal military command and control.”

“On the basis of the Trial Record, the Trial Chamber is also satisfied beyond reasonable doubt that General Galic, as a Corps commander, had the material ability to prosecute and punish those who would go against his orders or had violated military discipline, or who had committed criminal acts.”

“The Trial Chamber finds that the Accused General Galic, commander of the Sarajevo Romanija Corps, had effective control, in his zone of responsibility, of the [Sarajevo Romanija Corps] troops.” *But see Galic*, (Trial Chamber), December 5, 2003,

para. 750 (because Galic was found guilty under Article 7(1), the Trial Chamber did not ultimately find him responsible under Article 7(3).)

(c) no command responsibility for crimes in Ahmici, Santici, Pirici, and Nadioci on April 16, 1993 where Appellant took the measures reasonable within his material ability to denounce the crimes and requested an investigation

Blaskic, (Appeals Chamber), July 29, 2004, paras. 418, 420-422: “Evidence admitted on appeal supports the conclusion that the Appellant [as commander of the HVO (Croatian Defense Council’s armed forces)] requested that an investigation into the crimes committed in Ahmici be carried out, and that the investigation was taken over by the SIS [HVO Security and Information Service] Mostar.”

“The Appeals Chamber considers that the trial evidence assessed together with the additional evidence admitted on appeal shows that the Appellant took the measures that were reasonable within his material ability to denounce the crimes committed, and supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmici be carried out, that the investigation was taken over by the SIS Mostar, that he was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him.”

“For the foregoing reasons, and having examined the legal requirements for responsibility under Article 7(3) of the Statute, the Appeals Chamber concludes that the Appellant lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on 16 April 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied.”

“In light of the foregoing, the Appeals Chamber is not satisfied that the trial evidence, assessed together with the additional evidence admitted on appeal, proves beyond reasonable doubt that the Appellant is responsible under Article 7(3) of the Statute for having failed to prevent the commission of crimes in Ahmici, Santici, Pirici, and Nadioci on 16 April 1993 or to punish the perpetrators.”⁴⁷

⁴⁷ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent *or* punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

**(d) no command responsibility over Army of the Republic of
Bosnia and Herzegovina troops in Grabovica and Uzdol**

Halilovic, (Trial Chamber), November 16, 2005, paras. 747, 750-752: “Having examined all the evidence presented to it and in light of its factual findings, the Trial Chamber finds that the Prosecution has not proven beyond reasonable doubt that Sefer Halilovic had effective control over the troops that were in Grabovica on 8 and 9 September 1993, which the Trial Chamber has found committed the crimes.” “The Trial Chamber considers that the evidence presented does not show that Sefer Halilovic had any role in the investigations concerning the crimes committed in Uzdol The Trial Chamber finds that based on the evidence presented, it cannot be concluded that Sefer Halilovic had the material ability to punish the perpetrators of the crimes committed in Uzdol.” “Having examined all the evidence presented to it and in light of its factual findings, the Trial Chamber finds that the Prosecution has not proved beyond reasonable doubt that Sefer Halilovic had effective control over the units under [Army of the Republic of Bosnia and Herzegovina] command, which the Trial Chamber has found committed the crimes in Uzdol.”

“The Trial Chamber recalls its finding that Sefer Halilovic possessed a degree of influence as a high ranking member of the [Army of the Republic of Bosnia and Herzegovina] and as one of its founders. However, the Trial Chamber considers that Sefer Halilovic's influence falls short of the standard required to establish effective control. It is a principle of international criminal law that a commander cannot be held responsible for the crimes of persons who were not under his command at the time the crimes were committed. The Trial Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that Sefer Halilovic was either *de jure* or *de facto* commander of an operation called ‘Operation Neretva,’ which the Prosecution alleges was carried out in Herzegovina. The Trial Chamber has also found that the Prosecution has failed to establish that Sefer Halilovic had effective control over the troops which committed the crimes in the areas of Grabovica and Uzdol. The Trial Chamber therefore finds that the Prosecution has failed to establish that Sefer Halilovic was responsible under Article 7(3) for the crimes committed in Grabovica and Uzdol.”

ii) *mens rea* (element 2)

Limaj et al., (Trial Chamber), November 30, 2005, para. 523: “For a superior to be held responsible under Article 7(3) of the Statute for crimes committed by a subordinate, it must be established that he knew or had reason to know that the subordinate was about to commit or had committed such crimes.” *See also Halilovic*, (Trial Chamber), November 16, 2005, para. 65 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 367 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 792 (similar); *Brđanin*, (Trial Chamber), September 1, 2004, para. 278 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 460 (similar); *Blaskić*, (Trial Chamber), March 3, 2000, para. 294

(similar).

Halilović, (Trial Chamber), November 16, 2005, para. 65: “It must be proved either that (1) the superior had actual knowledge that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or that (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes had been or were about to be committed by his subordinates.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 792 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 278 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 460 (similar).

See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 686: “The Trial Chamber finds that the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent.”

(1) actual knowledge

(a) knowledge may be proven through direct or circumstantial evidence

Limaj et al., (Trial Chamber), November 30, 2005, para. 524: “While a superior’s actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, it may be established by circumstantial evidence” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 66 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 368 (same as *Halilović*).

Galic, (Trial Chamber), December 5, 2003, para. 174: “In the absence of direct evidence of the superior’s actual knowledge of the offences committed by his or her subordinates, this knowledge may be established through circumstantial evidence.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 792 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 278 (same as *Blagojević*); *Stakić*, (Trial Chamber), July 31, 2003, para. 460 (same as *Blagojević*); *Blaskić*, (Trial Chamber), March 3, 2000, para. 307 (similar).

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 427: “Actual knowledge, which may be defined as the awareness that the relevant crimes were committed or were about to be committed, may be established through direct or circumstantial evidence. Circumstantial evidence will allow for an inference that the superior ‘must have known’ of subordinates’ criminal acts.”

(b) factors for assessing actual knowledge

Limaj et al., (Trial Chamber), November 30, 2005, para. 524: Circumstantial evidence of a superior's actual knowledge that his subordinates were committing or were about to commit a crime includes: "the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and location of the commander at the time." See also *Halilović*, (Trial Chamber), November 16, 2005, para. 66 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 368 (same quoted language); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 792 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 460 (similar); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 427 (similar).

(c) evidence required to demonstrate actual knowledge may differ based on position of authority

Halilović, (Trial Chamber), November 16, 2005, para. 66: "[T]he fact that a military commander 'will most probably' be part of an organised structure with reporting and monitoring systems has been found to facilitate proof of actual knowledge." See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 792 (similar).

Galic, (Trial Chamber), December 5, 2003, para. 174: "The Trial Chamber also takes into consideration the fact that the evidence required to prove such knowledge for a commander operating within a highly disciplined and formalized chain of command with established reporting and monitoring systems is not as high as for those persons exercising more informal types of authority."

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 428: "Depending on the position of authority held by a superior, whether military or civilian, *de jure* or *de facto*, and his level of responsibility in the chain of command, the evidence required to demonstrate actual knowledge may be different. [T]he actual knowledge of a military commander may be easier to prove considering the fact that he will presumably be part of an organised structure with established reporting and monitoring systems. In the case of *de facto* commanders of more informal military structures, or of civilian leaders holding *de facto* positions of authority, the standard of proof will be higher."

(d) position of command relevant as indicia of accused's knowledge, but does not create strict liability

Blaskić, (Appeals Chamber), July 29, 2004, paras. 56-57: "[The appellant] challenges the statement of the Trial Chamber in paragraph 308 of the Trial Judgement that:

[t]hese indicia must be considered in light of the accused's position of command, if established. Indeed, as was held by the *Aleksašević* Trial Chamber, an

individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates.

The Appellant contends that this statement applies the standard of strict liability by founding his actual knowledge on the basis of his position of command.”

“The Appeals Chamber disagrees with this interpretation of the Trial Judgement. The Trial Chamber [correctly] referred to the Appellant's position of command . . . not as the criterion for, but as indicia of the accused's knowledge.” “[T]here is no merit in the Appellant's allegation of the application of strict liability by the Trial Chamber to his case. This aspect of the appeal is dismissed.”

Blaskic, (Trial Chamber), March 3, 2000, para. 308: “[A]n individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates.”

(e) the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove actual knowledge

Halilovic, (Trial Chamber), November 16, 2005, para. 66: “In relation to geographical and temporal circumstances, the more physically distant the superior was from the scene of the crimes, the more evidence which may be necessary to prove that he had actual knowledge of them. On the other hand, if the crimes were committed next to the superior's duty-station this may be an important *indicium* that the superior had knowledge of the crimes, and even more so if the crimes were repeatedly committed.” *See also Stakic*, (Trial Chamber), July 31, 2003, para. 460 (similar); *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 72 (same as *Stakic*).

(f) knowledge may be presumed if a superior had means to obtain information of a crime and deliberately refrained from doing so

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 792: “Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 278 (same).

(g) application—knowledge that subordinates were committing or about to commit crimes

(i) knowledge of General of Sarajevo Romanija Corps as to crimes committed by forces in Sarajevo

Galic, (Trial Chamber), December 5, 2003, paras. 700-705: In assessing General Galic's knowledge of criminal activity of the Sarajevo Romanija Corps, the Trial Chamber stated: "Although it has found that the reporting and monitoring system of the [Sarajevo Romanija Corps] was good, the Trial Chamber cannot discount the possibility that General Galic was not aware of each and every crime that had been committed by the forces under his command."

"The Trial Chamber recalls however that the level of evidence to prove such knowledge is not as high for commanders operating within a highly disciplined and formalised chain of command as for those persons exercising more informal types of authorities, without organised structure with established reporting and monitoring systems. The Trial Chamber has found that the [Sarajevo Romanija Corps]'s chain of command functioned properly."

"[I]here is a plethora of credible and reliable evidence that General Galic was informed personally that [Sarajevo Romanija Corps] forces were involved in criminal activity. The Accused's responses to formal complaints delivered to him form the backdrop of his knowledge that his subordinates were committing crimes, some of which are specifically alleged in the Indictment. Not only General Galic was informed personally about both unlawful sniping and unlawful shelling activity attributed to [Sarajevo Romanija Corps] forces against civilians in Sarajevo, but his subordinates were conversant with such activity. The Trial Chamber has no doubt that the Accused was subsequently informed by his subordinates."

"[I]t would be inconceivable that given the importance of artillery assets for a Corps commander, especially one with an infantry disadvantage, the Accused was not fully appraised of the use of [Sarajevo Romanija Corps] artillery. At a minimum, and as mentioned by witnesses, the daily ammunition expenditure had to be recorded and be known. The Trial Chamber has already made findings in relation to the widespread character of unlawful activities. These criminal activities had to be carried out by using a vast amount of ammunition. The rate of use of ammunition which would have been in excess of what was required for regular military operations, is among the reasons which allow the Trial Chamber to infer that the Accused knew of criminal activities by his troops. The Trial Chamber is convinced that the Accused, as a Corps commander, was in full control of [Sarajevo Romanija Corps] artillery assets and knew of the rate of use of ammunition."

"[Additionally], in view of the circumstances which prevailed during the conflict, the notoriety of certain of the incidents scheduled in the Indictment and the systematic character of these criminal acts which extended over a prolonged period of

time, in conjunction with the media coverage of which the [Sarajevo Romanija Corps] Corps command was aware, renders the Accused's professed ignorance untenable."

"The Trial Chamber finds that General Galic, beyond reasonable doubt, was fully apprised of the unlawful sniping and shelling at civilians taking place in the city of Sarajevo and its surroundings." *But see Galic*, (Trial Chamber), December 5, 2003, para. 750 (because Galic was found guilty under Article 7(1), the Trial Chamber did not ultimately find him responsible under Article 7(3).)

(2) reason to know

(a) analyze whether information was available to the superior that would put him on notice

Blaskic, (Appeals Chamber), July 29, 2004, para. 62: "The Appeals Chamber considers that the *Celebici* [a/k/a *Delalic*] Appeal Judgement has settled the issue of the interpretation of the standard of 'had reason to know.' In that judgement, the Appeals Chamber stated that 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates.'" (emphasis in original)

Delalic, et al., (Appeals Chamber), February 20, 2001, para. 241: "The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard 'had reason to know,' that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment." *See Blaskic*, (Appeals Chamber), July 29, 2004, para. 405 ("[T]he interpretation of the 'had reason to know' standard shall remain the one given in the *Celebici* [a/k/a *Delalic*] Appeal Judgement.").

Limaj et al., (Trial Chamber), November 30, 2005, para. 525: "In determining whether a superior 'had reason to know' that his subordinates were committing or about to commit a crime, it must be shown that specific information was in fact available to him which would have provided notice of offences committed or about to be committed by his subordinates." *See also Strugar*, (Trial Chamber), January 31, 2005, para. 369 (similar).

Halilovic, (Trial Chamber), November 16, 2005, para. 67: "A commander will be considered to have 'had reason to know' only if information was available to him which would have put him on notice of offences committed by his subordinates, or about to be committed."

(i) general information that would put the superior on notice suffices

Krnjelac, (Appeals Chamber), September 17, 2003, para. 154: “The *Celebici* [a/k/a *Delalić*] Appeals Judgement defines the ‘had reason to know’ standard by setting out that ‘[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he “had reason to know” [...]’” See also *Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 238 (same language as quoted).

Halilović, (Trial Chamber), November 16, 2005, para. 68: “The Appeals Chamber in *Celebici* [a/k/a *Delalić*] held that even general information in the possession of the commander which would put him on notice of possible unlawful acts by his subordinates would be sufficient.”

Strugar, (Trial Chamber), January 31, 2005, para. 370: “It was further observed that even general information in [the superior’s] possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient.”

Galić, (Trial Chamber), December 5, 2003, para. 175: “In relation to the superior’s ‘having reason to know’ that subordinates were about to commit or had committed offences, ‘a showing that a superior had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he had “reason to know.”’”

(ii) information need not be explicit or specific

Krnjelac, (Appeals Chamber), September 17, 2003, para. 154: “This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 68 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 155: “The Appeals Chamber finds that this case-law shows only that, with regard to a specific offence (torture for example), the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed.”

Delalić et al., (Appeals Chamber), February 20, 2001, para. 238: “This information does not need to provide specific information about unlawful acts committed or about to be committed.”

Galic, (Trial Chamber), December 5, 2003, para. 175: “The information . . . need not to be explicit or specific. For instance, past behaviour of subordinates or a history of abuses might suggest the need to inquire further.”

Compare Krnojelac, (Appeals Chamber), September 17, 2003, para. 155: “It may not be inferred from this case-law that, where one offence (the ‘first offence’) has a material element in common with another (the ‘second offence’) but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7(3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment). Such an inference is not admissible with regard to the principles governing individual criminal responsibility. In other words, and again using the above example of the crime of torture, in order to determine whether an accused ‘had reason to know’ that his subordinates had committed or were about to commit acts of torture, the court must ascertain whether he had sufficiently alarming information (bearing in mind that, as set out above, such information need not be specific) to alert him to the risk of acts of torture being committed, that is of beatings being inflicted not arbitrarily but for one of the prohibited purposes of torture. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture.”

(b) the information may be written or oral, and need not be a specific report

Delalic et al., (Appeals Chamber), February 20, 2001, para. 238: “As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system.”

Galic, (Trial Chamber), December 5, 2003, para. 175: “The information available to the superior may be in written or oral form.”

(c) inquiry is whether superior is in possession of information; irrelevant whether he acquainted himself with it

Delalic et al., (Appeals Chamber), February 20, 2001, para. 239: “[T]he relevant information only needs to have been provided or available to the superior, or . . . ‘in the possession of’ [the superior]. It is not required that he actually acquainted himself with the information.”

Galic, (Trial Chamber), December 5, 2003, para. 175: “It is not required that the superior had actually acquainted himself or herself with the information in his or her possession.”

(d) superior has “reason to know” if the information available is sufficient to justify further inquiry

Limaj et al., (Trial Chamber), November 30, 2005, para. 525: “[T]he information in fact available need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior be in possession of sufficient information, even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 369 (similar).

Halilovic, (Trial Chamber), November 16, 2005, para. 68: “A superior may be regarded as having ‘reason to know’ if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, that is, if the information available is sufficient to justify further inquiry. However, the information in fact available to him need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes. Thus a commander’s knowledge of, for example, the criminal reputation of his subordinates may be sufficient to meet the *mens rea* standard required by Article 7(3) of the Statute if it amounted to information which would put him on notice of the ‘present and real risk’ of offences within the jurisdiction of the Tribunal.”

Strugar, (Trial Chamber), January 31, 2005, para. 370: “A superior may be regarded as having ‘reason to know’ if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, if the information available is sufficient to justify further inquiry.”

(e) failing to acquire knowledge does not create criminal responsibility

Blaskic, (Appeals Chamber), July 29, 2004, para. 62: “[T]he Appeals Chamber [in *Celebici a/k/a Delalic*] stated that ‘[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take

necessary and reasonable measures to prevent or to punish.’ There is no reason for the Appeals Chamber to depart from that position.”⁴⁸

Delalic, et al., (Appeals Chamber), February 20, 2001, para. 226: “Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”⁴⁹

Limaj et al., (Trial Chamber), November 30, 2005, para. 525: “The information must in fact be available to the superior who may not be held liable for failing to acquire such information in the first place.”

Halilovic, (Trial Chamber), November 16, 2005, para. 69: “A superior is not liable for failing to acquire information in the first place.”

Strugar, (Trial Chamber), January 31, 2005, para. 369: “A superior is not liable for failing to acquire such information in the first place. The mental element of ‘reason to know’ is determined only by reference to the information in fact available to the superior.”

Strugar, (Trial Chamber), January 31, 2005, para. 370: “The Appeals Chamber upheld this approach and held that a superior will be criminally responsible by virtue of the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates, or about to be committed.”

**(f) however, superior may not deliberately refrain from
obtaining information or remain “willfully blind” of the
acts of subordinates**

Blaskic, (Appeals Chamber), July 29, 2004, para. 406: “[T]he Appeals Chamber considers that the mental element ‘had reason to know’ as articulated in the Statute, does not automatically imply a duty to obtain information. The Appeals Chamber emphasizes

⁴⁸ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent or punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest, and, particularly, footnote 51.

⁴⁹ *Id.*

that responsibility can be imposed for *deliberately* refraining from finding out but not for negligently failing to find out.” (emphasis in original)

Delalic, et al., (Appeals Chamber), February 20, 2001, para. 226: “The Appeals Chamber takes it that the Prosecution seeks a finding that ‘reason to know’ exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution’s argument that a breach of the duty of a superior to remain constantly informed of his subordinates’ actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander’s failure to remain apprised of his subordinates’ action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.” (emphasis in original)

Halilovic, (Trial Chamber), November 16, 2005, para. 69: “The Appeals Chamber has held that knowledge cannot be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but it may be presumed where a superior had the *means* to obtain the relevant information and deliberately refrained from doing so. Furthermore, a commander is not permitted to remain ‘wilfully blind’ of the acts of his subordinates.” (emphasis in original)

Stakic, (Trial Chamber), July 31, 2003, para. 460: “Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.”

(g) application—reason to know that subordinates were committing or about to commit crimes

(i) torture at KP Dom prison complex in Foca

Krnjelac, (Appeals Chamber), September 17, 2003, para. 171: “The Appeals Chamber holds that the external context (i.e. the circumstances in which the detention centre was set up) and the internal context (i.e. the operation of the centre, in particular, the widespread nature of the beatings and the frequency of the interrogations), taken together with the facts that Krnjelac witnessed the beating inflicted on Zekovic ostensibly for the prohibited purpose of punishing him for his failed escape, that after this event at least one other detainee, witness FWS-73, was the victim of acts of torture and that the Trial Chamber dismissed Krnjelac’s claim that he was unaware of any punishment inflicted as a result of Zekovic’s escape, mean that no reasonable trier of

fact could fail to conclude that Krnojelac had reason to know that some of the acts had been or could have been committed for one of the purposes prohibited by the law on torture. Krnojelac had a certain amount of general information putting him on notice that his subordinates might be committing abuses constituting acts of torture. Accordingly, he must incur responsibility pursuant to Article 7(3) of the Statute. It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control. There is no doubt that, given the information available to him, Krnojelac was in a position to exercise such control, that is, to investigate whether acts of torture were being committed, especially since the Trial Chamber considered he had the power to prevent the beatings and punish the perpetrators. In holding that no reasonable trier of fact could have made the same findings of fact as the Trial Chamber, the Appeals Chamber takes the view that the Trial Chamber committed an error of fact.”

(ii) murder at KP Dom prison complex in Foca

Krnojelac, (Appeals Chamber), September 17, 2003, paras. 177-179: “The Appeals Chamber does not consider the Trial Chamber’s finding that the information available to Krnojelac was insufficient to put him on notice of his subordinates’ involvement in the murder of detainees to be reasonable.”

“In paragraph 339 of the Judgment, the Trial Chamber concluded that 26 detainees died as a result of the acts of members of the military coming from outside into the KP Dom [prison complex] and of the guards of the KP Dom. Although the facts accepted by the Trial Chamber do not necessarily mean that Krnojelac *knew* that murders were being or might be being committed by his subordinates, they do mean that Krnojelac *had reason to know* that murders were being or might be being committed by his subordinates. Thus, as shown by the Prosecution, the Appeals Chamber considers that no reasonable trier of fact could fail to conclude that a certain amount of information was available to Krnojelac which, taken as a whole, was sufficiently alarming and was such as to alert him to the risk of murders being committed inside the prison. First, it appeared that the detainees died as a result of the beatings committed within the KP Dom. As the Trial Chamber observed, all of the deceased persons listed in Schedule C were either beaten to death, shot, or died later as a result of the injuries inflicted by the beating in one of the isolation cells of the KP Dom. The Appeals Chamber refers back to the facts accepted by the Trial Chamber – as set out for the previous ground of appeal – regarding the context in which the beatings were committed, the widespread nature of these beatings and Krnojelac’s jurisdiction as prison warden over his subordinates, who were the perpetrators of these beatings. The Trial Chamber indicated that, in view of the widespread nature of the beatings at the KP Dom and the obvious resulting marks on the detainees, Krnojelac could not have failed to learn of them, although he denies it. Furthermore, the Appeals Chamber recalls that the Trial Chamber noted that Krnojelac

was aware that detainees were disappearing. The Trial Chamber accepted that, in the month of June 1992, witness RJ told Kmojelac that the detainees could hear the sounds of people being beaten in the administration building and that people were disappearing from the KP Dom overnight. Lastly, the Appeals Chamber is of the opinion that Kmojelac was in a position to see the blood stains spattered along the corridors of the KP Dom and the bullet holes in the walls of the entrance to the administration building. As the Trial Chamber stated, the Accused went to the KP Dom almost every day of the working week. While there he would go to the canteen, the prison yard or elsewhere inside the compound, all places where he had ample opportunity to notice the physical condition of the non-Serb detainees. There can therefore be no doubt that he was also in a position to see the blood stains and bullet holes marking the walls.”

“The Appeals Chamber holds that these facts constitute sufficiently alarming information such as to require Kmojelac to carry out an additional investigation. Given that he was aware of the beatings and suspicious disappearances and that he saw the bullet holes in the walls, Kmojelac was in a position to ascertain that the perpetrators of the beatings may have committed murders. At the very least, he should have carried out an investigation. The Appeals Chamber holds that no reasonable trier of fact could have reached the findings of fact made by the Trial Chamber. Accordingly, the Appeals Chamber considers that the Trial Chamber committed an error of fact which, for the above reasons, occasioned a miscarriage of justice.” (emphasis in original)

(3) application—knew or reason to know that subordinates were committing or about to commit crimes

(a) JNA (Yugoslav Peoples’ Army) artillery fire on Dubrovnik and attack on Srd

Strugar, (Trial Chamber), January 31, 2005, paras. 415–419, 446: “Article 7(3) of the Statute gives rise to a significant issue. This is whether, by virtue of the JNA [Yugoslav Peoples’ Army] artillery fire on Dubrovnik to be expected in support of the attack the Accused [commander of the Second Operational Group of the JNA (Yugoslav Peoples’ Army)] ordered on Srd, he knew or had reason to know that in the course of the attack the JNA artillery would commit offences such as the acts charged. By way of general analysis the Accused knew of the recent shelling of the Old Town in October and November by his forces.”

“In the view of the Chamber, as discussed earlier in this decision, what was known to the Accused when he ordered the attack on Srd on 5 December 1991, and at the time of the commencement of the attack on 6 December 1991, gave the Accused reason to know that criminal acts such as those charged *might* be committed by his forces in the execution of his order to attack Srd. Relevantly, however, the issue posed by Article 7(3) of the Statute is whether the Accused then had reason to know that offences were about to be committed by his forces. The language at first glance, could suggest a

definite expectation that an offence will be committed. As the jurisprudence has helped to demonstrate, the operation intended by the provision is, relevantly, that an accused must be shown to have 'reason to know' by virtue of information he possesses. This information must be such as at least to put him on notice of the risk of such offences so as to indicate the need for additional information or investigation to ascertain whether such offences were about to be committed. In other words an accused cannot avoid the intended reach of the provision by doing nothing, on the basis that what he knows does not make it entirely certain that his forces were actually about to commit offences, when the information he possesses gives rise to a clear prospect that his forces were about to commit an offence. In such circumstances the accused must at least investigate, *i.e.* take steps *inter alia* to determine whether in truth offences are about to be committed, or indeed by that stage have been committed or are being committed."

"It has not been established, therefore, that, before the commencement of the attack on Srd, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence."

"That being so, the Chamber will therefore consider whether, in the course of the attack on Srd on 6 December 1991, what was known to the Accused changed so as to attract the operation of Article 7(3)." The evidence shows "he was on notice of the clear and strong risk that already his artillery was repeating its previous conduct and committing offences such as those charged. In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijevic ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional information, *i.e.* for investigation, to better assess the situation to determine whether the JNA [Yugoslav Peoples' Army] artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, *i.e.* so as to constitute criminal conduct." "As the Chamber has found earlier in this decision, already by about 0700 hours, there had been shelling of Dubrovnik by the Accused's forces, and, at least in respect of the Old Town, shelling that was not targeted at Croatian defensive positions or believed positions. Unlawful shelling was occurring. By that time his attacking infantry had not reached Srd, which was still being subjected to heavy JNA [Yugoslav Peoples' Army] artillery shelling."

"In view of the findings made earlier in this section, the Chamber is satisfied that the Accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. The Chamber is further satisfied that as of around 0700 hours on 6 December 1991 the Accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the Accused did not ensure that he obtained reliable information whether there was in truth JNA shelling of Dubrovnik occurring, especially

of the Old Town, and if so the reasons for it. Further, the Accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. The Chamber is further satisfied that at no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. The Chamber is therefore satisfied that the elements required for establishing the Accused's superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established." (emphasis in original)

(b) sniping and shelling of Sarajevo

Galic, (Trial Chamber), December 5, 2003, para. 706: "Having found that General Galic had the actual knowledge that criminal acts were being committed by forces under his effective command and control [the Sarajevo Romanija Corps of the Army of Republika Srpska], the Trial Chamber does not consider it necessary to dwell on the reasons the Accused had to know about the crimes proved at trial. It may only recall, briefly, that the information available to the Accused of the widespread sniping and shelling that forms the basis of the Indictment was available in numerous forms. The numerous complaints from the UN representatives would have, at a minimum, indicated to any reasonable commander a need for additional investigation in order to ascertain whether offences were being committed or were about to be committed by his subordinates. Given the nature of the Accused's command and the reporting and monitoring systems at his disposal, any continuing lack of actual knowledge on the part of the Accused of the unlawful acts perpetrated by forces under his command or control could only have stemmed from a deliberate refusal on his part to acquaint himself with that information which was readily available to him." *But see Galic*, (Trial Chamber), December 5, 2003, para. 750 (because Galic was found guilty under Article 7(1), the Trial Chamber did not ultimately find him responsible under Article 7(3).)

(c) attack on Stari Vitez and lorry bombing by the Vitezovi unit of the Croatian Defence Council—lack of *mens rea*

Blaskic, (Appeals Chamber), July 29, 2004, paras. 489, 490, 494: "There was no finding in the Trial Judgement, and there is no evidence to show, that the Appellant knew or had reason to know before the attack that crimes were about to be committed by the [Croatian Defence Council (army of the Bosnian Croats)] units under his command. In relation to the lorry bombing of 18 April 1993, there was no finding in the Trial Judgement, and there is no evidence to show, that the Appellant knew or had reason to know before the explosion that the crime was about to be committed by the Vitezovi unit. In fact, the evidence admitted on appeal suggests the contrary. On the basis of the

evidence before this Chamber, the issue of prevention of crimes does not, therefore, arise from these two events.”

“In respect of the attack on Stari Vitez of 18 July 1993, there was no finding in the Trial Judgement that the Appellant knew or had reason to know that crimes were about to be committed in the attack. Some evidence presented on appeal may have shown that the Appellant knew, as early as 2 July 1993, of preparations for an attack on Stari Vitez. There was no finding and there is no evidence to show that he knew or had reason to know beforehand that the ‘baby bombs’ [characterized by the Appellant as home-made mortars] would be used in that attack. The question of preventing the using of those bombs on civilian targets does not, therefore, arise.”

“For the foregoing reasons, the Appeals Chamber concludes that on the basis of the trial findings and evidence admitted on appeal, the issue of failure to prevent in terms of Article 7(3) of the Statute does not arise in relation to this part of the case.” *See Blaskić*, (Appeals Chamber), July 29, 2004, para. 462 (appellant characterizing “baby bombs” as home-made mortars).

(4) *mens rea* requirement same for civilian and military superiors

Brijunin, (Trial Chamber), September 1, 2004, para. 282: “The *mens rea* requirement for liability pursuant to Article 7(3) has been applied uniformly in cases before this Tribunal and the ICTR to both civilian and military superiors, in the sense that the same state of knowledge to establish superior criminal responsibility pursuant to Article 7(3) of the Statute is required for both civilian and military superiors.”

(5) *mens rea* inquiry should be conducted on a case-by-case basis

Krnjelac, (Appeals Chamber), September 17, 2003, para. 156: “The Appeals Chamber reiterates that an assessment of the mental element required by Article 7(3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.” *See also Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 239 (similar); *Halilović*, (Trial Chamber), November 16, 2005, para. 70 (similar).

(6) criminal negligence not a basis of responsibility

Blaskić, (Appeals Chamber), July 29, 2004, para. 63: “[T]he Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that ‘it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.’ It expressed that ‘[r]eferences to “negligence” in the context of superior responsibility are

likely to lead to confusion of thought’ The Appeals Chamber expressly endorses this view.”

Halilovic, (Trial Chamber), November 16, 2005, para. 71: “[T]he Trial Chamber must be satisfied that, pursuant to Article 7(3) of the Statute, the accused either ‘knew’ or ‘had reason to know.’ In this respect, the Trial Chamber notes that the Appeals Chamber has held that criminal negligence is not a basis of liability in the context of command responsibility.”

(7) superior responsibility may not be based on strict liability

Delalic et al., (Appeals Chamber), February 20, 2001, paras. 197, 239: “The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine.” “[C]ommand responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he ‘knew or had reason to know’ about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability.”

Halilovic, (Trial Chamber), November 16, 2005, para. 65: “Superior responsibility is not a form of strict liability. See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 792 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 278 (same); *Stakic*, (Trial Chamber), July 31, 2003, para. 460 (same).

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 369: “Liability under Article 7(3) is based on an omission as opposed to positive conduct. It should be emphasised that the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he ‘knew or had reason to know’ of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability.”⁵⁰

⁵⁰ There are both cases discussing the ability to prevent *and* punish as a means to judge effective control, and cases discussing the ability to prevent or punish as a means to judge effective control. For full discussion of whether the term should be “and” or “or,” see “the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3),” Section (VI)(c)(iii), ICTY Digest; and, particularly, footnote 51.

See also “responsibility attaches to a commander for dereliction of duty,” Section (VI)(b)(vi), ICTY Digest.

iii) the failure of the superior to take the necessary and reasonable measures to prevent and/or punish (element 3)

(1) there are two distinct legal obligations

Limaj et al., (Trial Chamber), November 30, 2005, para. 527: “Under Article 7(3), the superior has a duty both to prevent the commission of the offence and punish the perpetrators. These are not alternative obligations.” “[The superior’s] obligations to prevent will not be met by simply waiting and punishing afterwards.”⁵¹

Halilović, (Trial Chamber), November 16, 2005, para. 72: “Article 7(3) contains two distinct legal obligations: to prevent the commission of the offence and to punish the perpetrators thereof.”

Halilović, (Trial Chamber), November 16, 2005, para. 72: “A failure to take the necessary and reasonable measures to prevent an offence of which a superior knew or had reason to know cannot be cured simply by subsequently punishing the subordinate for the commission of the offence.” *See also Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 793 (same); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 279 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 461 (same).

Halilović, (Trial Chamber), November 16, 2005, paras. 93-94: “With regard to the jurisprudence of the Tribunal, the Appeals Chamber’s in *Blaskić* held that

it is illogical to argue both that ‘a superior’s responsibility for the failure to punish is construed as a sub-category of his liability for failing to prevent the

⁵¹ As to whether there is a duty to “prevent or punish” or “prevent and punish” the formulation could be considered to be as follows. If the commander has taken reasonable steps to prevent the commission of the crime and has succeeded, there is no obligation to punish since no crime occurred and the word “or” is appropriate. If the commander has taken reasonable steps to prevent the commission of the crime but failed, the commander has an obligation to punish the perpetrators, which would absolve the commander of criminal responsibility. If, the commander has taken no reasonable steps to prevent a crime, a violation has already occurred; however, the commander still has a continuing obligation to punish the perpetrators of the crime. In these latter instances, the word “and” is appropriate. If only one word is used, it seems preferable to use “and,” because the word “or” fails to reflect that there are two distinct legal obligations. See “there are two distinct legal obligations.” Section (VI)(c)(iii)(1), ICTY Digest. Given that the ICTY Statute uses the term “or,” the “and/or” formulation is a possible solution.

commission of unlawful acts,' and that 'failure to punish only led to the imposition of criminal responsibility if it resulted in a failure to prevent the commission of future crimes.' The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.

"The duty to punish is a separate form of liability, distinct from the failure to prevent it has in fact developed from the importance attached to a commander's duty to take preventative actions."

Strugar, (Trial Chamber), January 31, 2005, para. 373: "Article 7(3) does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators. . . . [I]f a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish afterwards."

Blaskic, (Trial Chamber), March 3, 2000, para. 336: "[T]he obligation to 'prevent or punish' does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards."

But see *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 793: "The third element which must be established is that the superior failed to take the necessary and reasonable measures to prevent *or* punish the crimes of his subordinates." (emphasis added) See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 279 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 461 (same as *Brdjanin*); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 441 (similar); *Blaskic*, (Trial Chamber), March 3, 2000, para. 294 (similar).⁵²

⁵² For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent *or* punish, see footnote 51.

(2) required to take necessary and reasonable measures

(a) what measures the superior is required to take depend on the superior's position of power

Strugar, (Trial Chamber), January 31, 2005, para. 372: "The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is intrinsically connected to the question of that superior's position of power."⁵³

(b) measures required are limited to what is feasible/ within a superior's material possibility

Blaskic, (Appeals Chamber), July 29, 2004, para. 417: "The Appeals Chamber considers that even though a determination of the necessary and reasonable measures that a commander is required to take in order to prevent or punish the commission of crimes, is dependent on the circumstances surrounding each particular situation, it generally concurs with the *Celbici* [a/k/a *Delalic*] Trial Chamber which held:

[i]t must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility."

See also *Delalic, et al.*, (Trial Chamber), November 16, 1998, para. 935 (source of quoted language).⁵⁴

Limaj et al., (Trial Chamber), November 30, 2005, para. 526: "A superior will be held responsible if he failed to take such measures that are within his material ability." See also *Halilovic*, (Trial Chamber), November 16, 2005, para. 74 (similar).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 793: "The measures required

⁵³ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent and punish, or prevent or punish, see footnote 51.

⁵⁴ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent and punish, or prevent or punish, see footnote 51.

of the commander are limited to those which are ‘within his power,’ meaning those measures which are ‘within his material possibility.’ A commander is not obliged to perform the impossible; he does, however, have a duty to exercise the measures that are possible within the circumstances” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 279 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 176 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 461 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 95 (similar).

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 445: “[A] superior has discharged his duty to prevent or punish if he uses every means in his powers to do so.”⁵⁵

(c) material ability to act and effective control determinative

Blaskić, (Appeals Chamber), July 29, 2004, para. 72: “The Appeals Chamber notes that the Trial Chamber held that:

... it is a commander’s degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator . . . this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.

It appears from this statement that necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates.”⁵⁶

Limaj et al., (Trial Chamber), November 30, 2005, para. 526: “The question of whether a superior has failed to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators thereof is connected to his possession of effective control.” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 74 (similar).⁵⁷

⁵⁵ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent or punish, see footnote 51.

⁵⁶ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent or punish, see footnote 51.

⁵⁷ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent or punish, see footnote 51.

Halilović, (Trial Chamber), November 16, 2005, para. 74: “These measures [that a commander has a duty to exercise] are such that can be taken within the material ability of a commander as evidenced by the degree of effective control he wielded over his subordinates.”

Strugar, (Trial Chamber), January 31, 2005, para. 372: “As the Tribunal’s definition of a ‘superior’ requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility.”

Blaskić, (Trial Chamber), March 3, 2000, para. 335: “[I]t is a commander’s degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator.”

(d) explicit legal capacity is immaterial

Limaj et al., (Trial Chamber), November 30, 2005, para. 526: “Whether the superior had explicit legal capacity to [take the necessary and reasonable measures to prevent the commission of a crime and/or punish the perpetrators] is immaterial provided that he had the material ability to act.” *See also Halilović*, (Trial Chamber), November 16, 2005, para. 73 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 372 (similar).

Halilović, (Trial Chamber), November 16, 2005, para. 73: “[T]he question as to whether a superior had explicit legal capacity to take such measures may be irrelevant under certain circumstances if it is proven that he had the material ability to act.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 793: “A commander . . . [has] a duty to exercise . . . measures that may be beyond his legal competence.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 279 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 461 (similar).

(e) what constitutes the measures required by the superior is a matter of evidence not substantive law

Blaskić, (Appeals Chamber), July 29, 2004, para. 72: “What constitutes [necessary and reasonable measures to prevent subordinates’ crimes] is not a matter of substantive law but of evidence, whereas the effect of such measures can be defined by law. . . .”

Halilović, (Trial Chamber), November 16, 2005, para. 74: “The determination of what constitutes ‘necessary and reasonable measures’ to prevent the commission of crimes or to punish the perpetrators is not a matter of substantive law but of evidence.” *See also* *Brdjanin*, (Trial Chamber), September 1, 2004, para. 279 (similar).⁵⁸

(f) determination will vary from case to case

Blaskić, (Appeals Chamber), July 29, 2004, para. 72: “The Appeals Chamber considers that it was open to the Trial Chamber not to list measures that might vary from case to case, since it had made it clear that such measures should be necessary and reasonable to prevent subordinates’ crimes or punish subordinates who had committed crimes.”⁵⁹

Halilović, (Trial Chamber), November 16, 2005, para. 74: “It is well established these measures [required of a superior to prevent an offense and/or punish the perpetrator] may ‘vary from case to case.’”

Galic, (Trial Chamber), December 5, 2003, para. 176: “The evaluation of the action taken by individuals in positions of superior authority who have a legal duty to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators, must be done on a case-by-case basis.”⁶⁰

Kordić and Čerkez, (Trial Chamber), February 26, 2001, para. 445: “Such a determination [of whether the superior has taken necessary and reasonable measures to prevent the commission of crimes and/or to punish the perpetrators] will be based on the circumstances of each case.”

⁵⁸ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent or punish, see footnote 51.

⁵⁹ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent or punish, see footnote 51.

⁶⁰ For discussion of whether there is a duty to take the necessary and reasonable measures to prevent *and* punish, or prevent or punish, see footnote 51.

**(g) factors to consider in determining whether measures were
necessary and reasonable**

Limaj et al., (Trial Chamber), November 30, 2005, para. 528: “Whether a superior has discharged his duty to prevent the commission of a crime will depend on his material ability to intervene in a specific situation. Factors which may be taken into account in making that determination include the superior’s failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war, the failure to protest against or to criticize criminal action, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under the superior’s command, and the failure to insist before a superior authority that immediate action be taken.”

Halilović, (Trial Chamber), November 16, 2005, para. 74: “When determining whether necessary and reasonable measures have been taken, the relevant factors to be considered include: whether specific orders prohibiting or stopping the criminal activities were issued, what measures to secure the implementation of these orders were taken, what other measures were taken to ensure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances, and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 378 (similar).

**(h) not required to prove the superior’s failure to act caused
the subordinate’s crime**

Blaskić, (Appeals Chamber), July 29, 2004, para. 77: “The Appeals Chamber is . . . not persuaded by the Appellant’s submission that the existence of causality between a commander’s failure to prevent subordinates’ crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case. Once again, it is more a question of fact to be established on a case by case basis, than a question of law in general.” *See also Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 832 (quoting same and accepting “this approach”).

Halilović, (Trial Chamber), November 16, 2005, paras. 76-78: “The *Celebici* [a/k/a *Delalić*] Trial Chamber concluded that the very existence of the principle of superior responsibility for failure to punish, recognised under Article 7(3) and in customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility. The *Kordić and Cerkez* Trial Chamber also endorsed this view.”

“The Appeals Chamber in *Blaskić* stated that it was ‘not persuaded by [the argument] that the existence of causality between a commander’s failure to prevent

subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case.” “The Trial Chamber further notes that the nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link. Command responsibility is responsibility for omission, which is culpable due to the duty imposed by international law upon a commander. If a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability imposed under Article 7(3).”

Brđjanin, (Trial Chamber), September 1, 2004, para. 280: “Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Hence, it is not necessary that the commander’s failure to act caused the commission of the crime.”

(3) the duty to prevent

Strugar, (Trial Chamber), January 31, 2005, para. 375: “A superior’s duty to prevent the commission of a crime is explicitly provided for by post World War II treaties. Additional Protocol I [to the Geneva Conventions] requires any commander who is aware that his subordinates are about to commit a crime ‘to initiate such steps as are necessary to prevent such violations.’”

(a) when duty to prevent arises

Limaj et al., (Trial Chamber), November 30, 2005, para. 527: “The duty to prevent arises from the time a superior acquires knowledge, or has reasons to know that a crime is being or is about to be committed A superior must act from the moment that he acquires such knowledge.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 373 (similar to first sentence).

Halilovic, (Trial Chamber), November 16, 2005, paras. 72, 79, 90: “The duty to prevent arises when the commander acquires actual knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed. . . .” “According to the jurisprudence of the Tribunal, the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or has reason to know thereof.” “From the wording of Article 7(3) it is clear that the preventative element of

the duty to prevent attaches where the subordinate ‘was *about* to commit such acts,’ but before the actual offence has been committed. This interpretation is supported by the ICRC [International Committee of the Red Cross] Commentary to Article 86 of Additional Protocol I [to the Geneva Conventions] which notes that paragraph 1 is a ‘general obligation to *repress or suppress* breaches resulting from a failure to act,’ the use of the term ‘repress’ in Article 86(1) of Additional Protocol I indicates that the duty only attaches where the subordinate is on the point of committing an offence and from the moment of knowledge on the part of the superior.” (emphasis in original)

Kvočka et al., (Trial Chamber), November 2, 2001, para. 317: “Action is required on the part of the superior from the point at which he ‘knew or had reason to know’ of the crimes committed or about to be committed by subordinates.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 445: “The duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes.”

(b) duty to prevent includes both a general and specific obligation

Halilović, (Trial Chamber), November 16, 2005, para. 80: “The duty to prevent may be seen to include both a ‘general obligation’ and a ‘specific obligation’ to prevent crimes within the jurisdiction of the Tribunal. The Trial Chamber notes, however, that only the ‘specific obligation’ to prevent triggers criminal responsibility as provided for in Article 7(3) of the Statute.”

(c) general preventative obligations of a commander

Halilović, (Trial Chamber), November 16, 2005, para. 81: “The existence of a general obligation to prevent the commission of crimes stems from the duty of a commander, arising from his position of effective control, which places him in the best position to prevent serious violations of international humanitarian law. This obligation can be seen to arise from the importance which international humanitarian law places on the prevention of violations.” For additional discussion of duties of commanders, see *Halilović*, (Trial Chamber), November 16, 2005, paras. 82-85.

Halilović, (Trial Chamber), November 16, 2005, paras. 86-88: “It transpires from the jurisprudence of the Tribunal that some prior preventative measures may be required of a superior. The Trial Chamber in the *Celebići* [a/k/a *Delalić*] case found that: ‘an important gap in any preventive efforts made by Mr. Mucic is that he as commander never gave any instructions to the guards as to how to treat the detainees.’ The Trial Chamber in *Kvočka* found that: ‘[t]here was certainly a duty to train and control the

guards in the camp, and to prevent and punish criminal conduct.” Similarly, the Trial Chamber in the *Strugar* case found that “[i]t remains relevant [...] that nothing had been done by the Accused before the attack [...] commenced to ensure that those planning, commanding and leading the attack [...] were reminded of the restraints on shelling the Old Town [of Dubrovnik], or to reinforce existing prohibition orders.” “The Trial Chamber notes that it is well established that international humanitarian law intends to bar not only actual breaches of its norms, but aims also at preventing its potential breaches. As noted above, international humanitarian law entrusts commanders with a role of guarantors of laws dealing with humanitarian protection and war crimes, and for this reason they are placed in a position of control over the acts of their subordinates, and it is this position which generates a responsibility for failure to act. It is a natural element of the *preventative* constituent of command responsibility that a commander must make efforts to ensure that his troops are properly informed of their responsibilities in international law, and that they act in an orderly fashion.” “While it is evident that no criminal liability may attach to the commander for failure in this duty *per se*, it may be an element to be taken into consideration when examining the factual circumstances of the case. However, the adherence to this general obligation does not suffice by itself to avoid the commanders criminal liability in case he fails to take the necessary appropriate measure under his specific obligation.” (emphasis in original)

(d) specific obligations to prevent: depends on superior’s power

Halilovic, (Trial Chamber), November 16, 2005, para. 89: “[W]hat the duty to prevent entails in a particular case will depend on the superior’s material ability to intervene in a specific situation. In establishing individual responsibility of superiors military tribunals set up in the aftermath of World War II have considered factors such as the superior’s failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under their command, the failure to protest against or to criticise criminal action, and the failure to insist before a superior authority that immediate action be taken.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 374 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 375: “The ICRC [International Committee of the Red Cross] commentary to [Additional Protocol I] notes that this duty [to prevent crimes] varies for each level of command, and by way of example, may imply that ‘a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander must ensure that an attack is interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks.’”

See also “what measures the superior is required to take depend on the superior’s position of power,” Section (VI)(c)(iii)(2)(a), ICTY Digest.

**(e) where unclear whether forces are about to commit crimes,
duty to investigate arises**

Halilović, (Trial Chamber), November 16, 2005, para. 90: “As the Trial Chamber in *Strugar* held:

an accused cannot avoid the intended reach of the provision by doing nothing, on the basis that what he knows does not make it entirely certain that his forces were actually about to commit offences, when the information he possesses gives rise to a clear prospect that his forces were about to commit an offence. In such circumstances the accused must at least investigate, i.e. take steps *inter alia* to determine whether in truth offences are about to be committed, or indeed by that stage have been committed or are being committed.”

See also under *mens rea* for command responsibility, “superior has ‘reason to know’ if the information available is sufficient to justify further inquiry,” Section (VI)(c)(ii)(2)(d), ICTY Digest.

**(f) issuance of routine orders and occasional reiteration of
obligation to respect Geneva Conventions insufficient**

Halilović, (Trial Chamber), November 16, 2005, para. 89: “The Tokyo Trial held that a superior’s duty may not be discharged by the issuance of routine orders and that more active steps may be required.”

Strugar, (Trial Chamber), January 31, 2005, para. 374: “The International Military Tribunal for the Far East has held that a superior’s duty may not be discharged by the issuance of routine orders and that more active steps may be required:

The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders...[.] His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out.”

(g) application—duty to prevent

(i) illegal shelling of the Old Town of Dubrovnik

Strugar, (Trial Chamber), January 31, 2005, paras. 422, 433-34: “[W]hen the Accused [then commander of the Second Operational Group of the JNA (Yugoslav Peoples’ Army)] was informed by General Kadijević around 0700 hours of the [European Community Monitor Mission] protest [of the shelling of the Old Town of Dubrovnik],

that put the Accused directly on notice of the clear likelihood that his artillery was then already repeating its earlier illegal shelling of the Old Town. The extent of the Accused's existing knowledge of the October and November shelling of the Old Town, of the disciplinary problems of the 3/472 mtrb [Third Battalion of the 472nd Motorised Brigade] and of its apparent role, at least as revealed by Admiral Jokić's November investigation, in the November shelling of Dubrovnik, especially the Old Town, and of his failure to clarify the intention of his order to attack Srd in regard to the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991."

"[T]he Accused had the legal authority and the material means to have stopped the shelling of the Old Town throughout the ten and a half hours it continued, as he also had the means and authority to stop the shelling of the wider Dubrovnik. No steps that may have been taken by the Accused were effective to do so. While the forces responsible for the shelling were under the immediate command of the 9 VPS [Ninth Military Naval Sector], they were under his superior command and were engaged in an offensive military operation that day pursuant to the order of the Accused to capture Srd."

"While the finding of the Chamber is that the Accused did not order that the attack on Srd be stopped when he spoke to Admiral Jokić around 0700 hours on 6 December 1991, the Chamber would further observe that had he in truth given that order, the effect of what followed is to demonstrate that the Accused failed entirely to take reasonable measures within his material ability and legal authority to ensure that his order was communicated to all JNA [Yugoslav Peoples' Army] units active in the attack, and to ensure that his order was complied with. This failure, alone, would have been sufficient for the Accused to incur liability for the acts of his subordinates pursuant to Article 7(3), even if he had ordered at about 0700 hours that the attack on Srd be stopped."

(ii) campaign of sniping in Sarajevo by the Sarajevo Romanija Corps of the Army of Republika Srpska

Galić, (Trial Chamber), December 5, 2003, para. 719: "The Trial Chamber has already found that the chain of command within the [Sarajevo Romanija Corps] functioned properly. Taking into account the lack of proper instruction to [Sarajevo Romanija Corps] troops, and considering that the criminal activity attributed to [Sarajevo Romanija Corps] forces extended over a period of twenty-three months, a strong inference is that, at the least, no reasonable measures were taken to prevent the commission of criminal acts perpetrated against civilians and that no reasonable commander could have

considered measures such as occasionally reiterating the obligation to respect the Geneva Conventions a reasonable way of addressing complaints of indiscriminate fire at civilians.” See also *Galic*, (Trial Chamber), December 5, 2003, paras. 717, 718 (discussing that “General Galic may have issued orders to abstain not to attack civilians” and that “[t]here is . . . some evidence that General Galic conveyed instructions to the effect of the respect of the 1949 Geneva Conventions.”). But see *Galic*, (Trial Chamber), December 5, 2003, para. 750 (because Galic was found guilty under Article 7(1), the Trial Chamber did not ultimately find him responsible under Article 7(3).)

(4) the duty to punish

(a) responsibility of commander for failure to punish recognized as customary law

Blaskic, (Appeals Chamber), July 29, 2004, para. 85: “In the view of the Appeals Chamber, the Trial Chamber did not err in finding to the effect that the responsibility of a commander for his failure to punish was recognised in customary law prior to the commission of crimes relevant to the Indictment.”

Halilovic, (Trial Chamber), November 16, 2005, para. 94: “The Appeals Chamber [in *Blaskic*] concluded that the responsibility of a commander for his failure to punish was recognised in customary law prior to the commission of the crimes relevant to that indictment.”

(b) when duty to punish arises

Limaj et al., (Trial Chamber), November 30, 2005, para. 527: “[T]he duty to punish arises after the superior acquires knowledge of the commission of the crime.”

Halilovic, (Trial Chamber), November 16, 2005, para. 72: “[T]he duty to punish arises after the commission of the crime.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 373 (same).

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 446: “The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish.”

(c) duty to punish is a separate form of responsibility

For discussion that the duty to punish is a separate form of responsibility, and discussion of whether there is a duty to prevent *and* punish, or a duty to prevent *or* punish, see Section (VI)(c)(iii), ICTY Digest, and footnote 51.

**(d) failure to punish may be tacit acceptance of crimes/
punishment is an inherent part of prevention of future
crimes**

Halilović, (Trial Chamber), November 16, 2005, paras. 95-96: “The argument that a failure to punish a crime is a tacit acceptance of its commission is not without merit. The Trial Chamber recognises that a commander, as the person in possession of effective control over his subordinates is entrusted by international humanitarian law with the obligation to ensure respect of its provisions. The position of the commander exercising authority over his subordinates dictates on his part to take necessary and reasonable measures for the punishment of serious violations of international humanitarian law and a failure to act in this respect is considered so grave that international law imputes upon him responsibility for those crimes. He has, in the words of the ICRC [International Committee of the Red Cross] Commentary to the Additional Protocol ‘tolerated breaches of the law of armed conflict.’”

“Finally, the Trial Chamber considers that punishment is an inherent part of prevention of future crimes. It is insufficient for a commander to issue preventative orders or ensure systems are in place for the proper treatment of civilians or prisoners of war if subsequent breaches which may occur are not punished. This failure to punish on the part of a commander can only be seen by the troops to whom the preventative orders are issued as an implicit acceptance that such orders are not binding.”

(e) satisfying the duty to punish

Blaskić (Appeals Chamber), July 29, 2004, paras. 68-69: “With regard to the position of the Trial Chamber that superior responsibility ‘may entail’ the submission of reports to the competent authorities, the Appeals Chamber deems this to be correct. The Trial Chamber only referred to the action of submitting reports as an example of the exercise of the material ability possessed by a superior.” “The Appeals Chamber also notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 529: “A superior’s duty to punish the perpetrators of a crime encompasses the obligation to conduct an effective investigation with a view to establishing the facts. The obligation on the part of the superior is to take active steps to ensure that the perpetrators will be punished. To that end, the superior may exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities.”

Halilović, (Trial Chamber), November 16, 2005, para. 100: “The duty to punish includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.” *See also*

Brđjanin, (Trial Chamber), September 1, 2004, para. 279 (similar); *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 446 (similar).

Halilović, (Trial Chamber), November 16, 2005, para. 98: “Military tribunals established after World War II interpreted the superiors’ duty to punish as implying an obligation for the superior to conduct an effective investigation and to take active steps to ensure that the perpetrators will be brought to justice. Whether the superior has called for a report on the incident and the thoroughness of the investigation could also be relevant in this respect.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 376 (similar).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 793: “The obligation to prevent or punish may, under some circumstances, be satisfied by reporting the matter to the competent authorities.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 461 (same); *Blaskić*, (Trial Chamber), March 3, 2000, para. 335 (similar).

(f) lack of formal legal competence to exercise measures will not necessarily preclude criminal responsibility

Halilović, (Trial Chamber), November 16, 2005, para. 100: “The superior . . . has a duty to exercise all measures possible within the circumstances; lack of formal legal competence on the part of the commander will not necessarily preclude his criminal responsibility.”

(g) superior need not be the person who dispenses punishment, but must take important step in disciplinary process

Halilović, (Trial Chamber), November 16, 2005, para. 100: “The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 316 (same).

(h) application—duty to punish

(i) shelling of the Old Town of Dubrovnik

Strugar, (Trial Chamber), January 31, 2005, paras. 436, 439, 444: “For reasons given earlier in this decision, the Chamber has found that the enquiry undertaken by Admiral Jokić [into the December 6, 1991 shelling of the Old Town of Dubrovnik] was a sham.” “[I]t seems that only a few written statements and reports were obtained in the day or two after 6 December 1991. These apparently supported the view, in essence, that the attack on Srd was the spontaneous reaction of Captain Kovacević of the 3/472 mtrb [Third Battalion of the 472nd Motorised Brigade, at the time, under the control of the 9th Military Naval Sector (9 VPS), which was part of the 2nd Operational Group of the

Yugoslav Peoples' Army (JNA)] to provocations by Croatian forces at Srd during the night of 5/6 December 1991. He acted alone and contrary to orders in carrying out the attack on Srd. Further, while there had been some shelling of Dubrovnik, this was in support of the attack on Srd and was apparently targeted at active Croatian military positions. The extent of the shelling and the damage it caused, especially to the Old Town, were significantly downplayed. The disciplinary consequences of the investigation was said to be that a battalion commander had been relieved of his command. Contrary to what may have been understood by many at the time, it is now clear that this battalion commander was not the commander who led the attack on Srd and the shelling, *i.e.* Captain Kovacevic of the 3/472 mtbr. As indicated elsewhere in this decision, it was Lieutenant-Colonel Jovanovic of the 3/5 mtbr [Third Battalion of the 5th Motorised Brigade].”

“[T]he evidence persuades the Chamber that the Accused was, at the very least by acquiescence, a participant in the arrangement by which Admiral Jokic undertook his sham investigation and sham disciplinary action, and reported to the First Secretariat in a way which deflected responsibility for the damage to the Old Town from the JNA [Yugoslav Peoples' Army].”

“The evidence establishes, in the Chamber's finding, that the Accused at all material times had full material and legal authority to act himself to investigate, or take disciplinary or other adverse action, against the officers of the 9 VPS [Ninth Military Naval Sector] who directly participated in, or who failed to prevent or stop, the unlawful artillery attack on the Old Town on 6 December 1991. Despite this the Accused chose to take no action of any type.”

(ii) campaign of sniping and shelling of Sarajevo

Galic, (Trial Chamber), December 5, 2003, paras. 720-723: In relation to General Galic's duty to prosecute and punish perpetrators of crimes [of sniping and shelling Sarajevo], the Trial Chamber has found that the Accused had the material ability to enforce usual military discipline among his troops.”

“There is no evidence in the Trial Record that [Sarajevo Romanija Corps] troops were prosecuted or punished for having unlawfully targeted civilians.”

“[T]he chain of command functioned effectively and that the Accused was reminded on a regular basis, by formal protests or by the media that criminal activity attributed to troops under his command was committed The lack of responsiveness by the [Sarajevo Romanija Corps] command rather demonstrates rather, at the least, a deliberate intent to let the situation pervade and continue rather than the impossibility of properly investigating, prosecuting and punishing.”

“In view of the above, the Trial Chamber finds that the Accused did not take reasonable measures to prosecute and punish perpetrators of crimes against civilians.” *But see Galic*, (Trial Chamber), December 5, 2003, para. 750 (because Galic was found

guilty under Article 7(1), the Trial Chamber did not ultimately find him responsible under Article 7(3))

For further discussion of the sniping and shelling of Sarajevo, see “campaign of sniping at, and shelling of, civilians in Sarajevo” as an unlawful attack on civilians and civilian objects, Section (II)(d)(xi)(12)(a), ICTY Digest, and “campaign of sniping and shelling attacks against civilians in Sarajevo,” Section (V)(c)(iii)(3)(b), ICTY Digest, for discussion of Galic’s responsibility under Article 7(1).

(5) civilian superiors are under similar obligations to prevent and punish

Brđjanin, (Trial Chamber), September 1, 2004, para. 283: “Civilian superiors are under similar obligations to prevent their subordinates’ crimes and to punish the perpetrators thereof as military superiors. Depending on the effective *de jure* or *de facto* powers enjoyed, one would need to consider whether these include an ability to require the competent authorities to take action.” See also *Kordić and Čerkez*, (Trial Chamber), February 26, 2001, para. 446 (similar).

d) Superior responsibility for genocide

i) superior criminal responsibility and crime of genocide recognized as customary international law

Brđjanin, (Trial Chamber), September 1, 2004, para. 713: “The Trial Chamber has previously noted that genocide is a crime recognised in customary international law, which by virtue of Article 4 of the Statute comes within the jurisdiction of the Tribunal. The Trial Chamber is also satisfied that superior criminal responsibility is recognised in customary international law, and that the Trial Chamber has jurisdiction over this form of criminal liability.”

ii) superior responsibility applies to the crime of genocide

Brđjanin, (Trial Chamber), September 1, 2004, para. 711: “Pursuant to Article 7(3) of the Statute, an accused in a hierarchically responsible position may be held liable for genocide as a result of his failure to carry out his duty as a superior to exercise control over his or her subordinates.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 715-716: “The Trial Chamber is satisfied that it reasonably falls within the application of the doctrine of superior criminal responsibility for superiors to be held liable if they knew or had reason to know that their subordinates were about to commit genocide or had done so and failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrators

thereof.” “This understanding is confirmed by the Statute, which in Article 7(3) explicitly refers to all the crimes within the jurisdiction of the Tribunal, including genocide, and which, according to the Appeals Chamber, ‘must be interpreted with the utmost respect to the language used by the legislator.’ In addition, with one exception [the *Stakić* Rule 98bis Decision] . . . , the application of superior criminal responsibility to the crime of genocide has not been contested in the jurisprudence of the Tribunal. Furthermore, it has been upheld in cases before the ICTR.”

iii) *mens rea* for superior responsibility for the crime of genocide

Brdjanin, (Trial Chamber), September 1, 2004, paras. 717-721: “An additional question is whether a superior is required to possess the specific intent for genocide in order to be held liable for genocide pursuant to Article 7(3). The question of the *mens rea* requirement for genocide pursuant to Article 7(3) has not been decided in the jurisprudence of the Tribunal. In the *Stakić* Rule 98bis Decision, the Trial Chamber seised of that case stated the following: ‘It follows from Article 4 and the unique nature of genocide that the *dolus specialis* is required for responsibility under Article 7(3) as well. The Trial Chamber notes the legal problems and the difficulty in proving genocide by way of an omission on the part of civilian leaders.’”

“Individuals have been tried and convicted before the ICTR for genocide pursuant to Article 6(3) of the ICTR Statute, which is the provision analogous to Article 7(3) of the Statute. The *Cyangugu* case strongly supports the conclusion that a superior need not possess the specific intent in order to be held liable for genocide pursuant to the doctrine of superior criminal responsibility.”

“The Trial Chamber is unable to agree with the *Stakić* Trial Chamber that a superior need possess the specific intent in order to be held liable for genocide pursuant to Article 7(3) of the Statute. Aside from the indications in the jurisprudence noted previously, the following reason militates against this conclusion.”

“As a matter of statutory interpretation, there is in the Trial Chamber’s view no inherent reason why, having verified that it applies to genocide, Article 7(3) should apply differently to the crime of genocide than to any other crime in the Statute. The Appeals Chamber has observed that superior criminal responsibility requires the Prosecution to establish that a superior knew or had reason to know of the criminality of subordinates. In the case of genocide, this implies that the superior must have known or had reason to know of his or her subordinate’s specific intent, with all the evidentiary difficulties that follow. The Appeals Chamber has held that superior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior before criminal liability can attach. It is therefore necessary to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior. The Appeals Chamber has warned against the danger of ‘conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach

to the accused.’ If the elements dictated by Article 7(3) are fulfilled, there is no reason why superiors should not be convicted pursuant to Article 7(3) for genocide; genocide is, after all, the crime with which the superiors associated themselves with, through the deliberate failure to carry out their duty to exercise control.” (italics omitted on *mens rea* in original)

“Thus, the Trial Chamber is satisfied that the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent.”⁸¹ (emphasis in original)

e) Application—superior responsibility

i) unlawful shelling of the Old Town of Dubrovnik

Strugar, (Trial Chamber), January 31, 2005, para. 446: “[T]he Chamber is satisfied that the Accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991 [forces of the JNA (Yugoslav Peoples’ Army)]. The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. The Chamber is further satisfied that as of around 0700 hours on 6 December 1991 the Accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the Accused did not ensure that he obtained reliable information whether there was in truth JNA [Yugoslav Peoples’ Army] shelling of Dubrovnik occurring, especially of the Old Town, and if so the reasons for it. Further, the Accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. The Chamber is further satisfied that at no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. The Chamber is therefore satisfied that the elements required for establishing the Accused’s superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established.”

⁸¹ Note that this position is certainly open to question, at least as a matter of logic, in that the *mens rea* required for superior responsibility for genocide would be easier to prove than the *mens rea* of a perpetrator of genocide.

ii) executions following the fall of Srebrenica

Obrenovic, (Trial Chamber), December 10, 2003, paras. 87, 88, 151: “Even while focusing on the defence of Zvornik, . . . Dragan Obrenovic had a responsibility as the Acting Commander and as the Deputy Commander and Chief of Staff [of the Zvornik Brigade of the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska)] to prevent the commission of crimes by his subordinates, and in the event that such crimes were committed, to punish those who committed criminal offences. Dragan Obrenovic did neither and is therefore . . . responsible under Article 7 (3) of the Statute.”

“[H]e knew or had reason to know that members of several units of the Zvornik Brigade took part in the killing operation at various locations [subsequent to the fall of Srebrenica] by guarding, executing and burying Muslim prisoners. The central part of Dragan Obrenovic’s responsibility arises therefore from his failure to act in the face of the commission of the crime of persecutions – by being passive when he should have prevented his subordinates from committing the criminal acts or punished them for such crimes afterwards.”

“Although there are few direct actions that Dragan Obrenovic took to further the murder operations, his *inaction* during these critical, devastating days itself had an impact on those working with, and under, him. Dragan Obrenovic spent most of these fateful days in the battlefield, but he was *aware* of the larger murder operation taking place. Through his failure to prevent his subordinates from participating in the detention, murder and burial of Bosnian Muslim men, Dragan Obrenovic bears criminal responsibility. Through his failure to punish his subordinates after they committed crimes which he knew or had reason to know about, Dragan Obrenovic bears criminal responsibility.” (emphasis in original)

iii) holding Bosnian Muslims under unlawful conditions of detention at the Vitez Cultural Centre and the Vitez veterinary hospital in Central Bosnia

(1) effective control

Blaskic, (Appeals Chamber), July 29, 2004, paras. 612-614: “The evidence before the Appeals Chamber clearly establishes that, contrary to the findings of the Trial Chamber, the Appellant did not enjoy or exercise effective command and control over all the [Croatian Defence Council (army of the Bosnian Croats)] units nominally subordinated to him.” “However, the Appeals Chamber holds that it was reasonable to find that the Appellant knew of the conditions of detention in the Vitez Cultural Centre and the Vitez veterinary hospital.” “The evidence at trial relating to the Vitez veterinary hospital shows that the personnel responsible for the detention of non-combatant Bosnian Muslims were regular HVO [Croatian Defence Council (army of the Bosnian Croats)]

soldiers under the Appellant's effective command – '[t]hey were HVO soldiers with HVO insignia on their sleeves.' The Vitez veterinary hospital itself was a municipal building approximately 900 metres from the Hotel Vitez. The Trial Chamber found that these perpetrators were under the Appellant's effective control."

(2) conditions of detention

Blaskic, (Appeals Chamber), July 29, 2004, para. 615: "The evidence relating to the Vitez Cultural Centre shows that it was in a municipal building approximately 100 metres from the Hotel Vitez. The building served as a detention centre from 16 April 1993 until the end of April 1993 for between 300 to 500 Bosnian Muslims under guard of the Military Police and HVO [Croatian Defence Council (army of the Bosnian Croats)] regulars. As a detention centre, it became overcrowded until the detainees were either released or transferred towards the end of April 1993. The Cultural Centre also housed the headquarters of the Vitez Brigade commander. That regular HVO personnel under the Appellant's effective command knew and made use of the detainees is beyond doubt. One witness testified that, while he was detained in the Vitez Cultural Centre, 'senior military delegations came to visit the building, headed by the Chief of Staff of the BiH army [Armed Forces of the Government of Bosnia and Herzegovina] at the time, Mr. Sefer Halilovic, and the commander of the HVO headquarters, Milivoj Petkovic. They were escorted by local commanders on both sides.'"

(3) actual knowledge of conditions

Blaskic, (Appeals Chamber), July 29, 2004, paras. 618-622: "The Appeals Chamber considers that:

- (i) the Appellant's personal proximity to some of the detention centres precludes the finding that he was unaware of the presence of the detainees there;
- (ii) the Appellant testified that he frequently visited the front lines;
- (iii) the Appellant's units [of the Croatian Defence Council (army of the Bosnian Croats)] were under-manned, yet the trenches continued to be dug pursuant to his orders;
- (iv) the Appellant ordered any mistreatment of detainees to cease on several occasions;
- (v) the practice was widely known to and reported by *inter alia* the ICRC [International Committee of the Red Cross], the ECMM [European Community Monitoring Mission], and UNPROFOR [UN Protection Force in Bosnia] representatives; and
- (vi) other [Croatian Defence Council (army of the Bosnian Croats)] personnel present in the area at the time testified that the detention of Muslims, and the use of detainees to dig trenches, was plainly evident.

“The trial evidence considered above demonstrates that the Appellant on occasion knew of the mistreatment of non-combatant Bosnian Muslims in detention facilities.”

“Furthermore, the Appeals Chamber has considered evidence from the trial record illustrating that detainees were held in locations in close proximity to the Appellant’s headquarters in Vitez, namely: the Vitez Cultural Centre (containing the Cinema Hall) and the Vitez veterinary hospital.”

“The veterinary station was used to detain up to 76 Bosnian Muslim men before they were transferred elsewhere. The veterinary station was not in the town of Vitez itself, but on the outskirts in an area called Rijeka, and fulfilled this function from 16 – 20 April 1993. The conditions were very poor – the basement was underground and unheated, water could penetrate, and it was very cramped. Detainees (all men from the age of 16 to 70) had to sit on the available wood in the basement to protect themselves from the dampness. At least some (if not all) detainees were transferred to the detention facility at Dubravica. Instances of forced removal of private property occurred.”

“The Appeals Chamber notes the Appellant’s contention that when he learned of unlawful detention, he took remedial action. The Appellant did succeed in having some of these detainees released by 30 April 1993, and others still on 9 May 1993, which does suggest both that he (i) was previously unaware of the unlawful conduct, but that (ii) nevertheless exercised a degree of effective control over the offending units and personnel as found above. The Appeals Chamber considers that this submission establishes that the Appellant knew of conditions of unlawful detention by the time he took the remedial action.”

“Having considered the trial evidence in this case, the Appeals Chamber concludes that it was open to a reasonable trier of fact to conclude beyond reasonable doubt that the Appellant knew that detainees had been unlawfully detained in the Vitez Cultural Centre and the Vitez veterinary hospital, and that he was aware that the conditions of their detention had been unlawful. This conclusion has not been contradicted by evidence admitted on appeal.”

(4) failure to punish

Blaskić, (Appeals Chamber), July 29, 2004, paras. 632-633: “The Appeals Chamber notes further that it has been established that superior responsibility may entail *inter alia* the submission of reports to the competent authorities in order to constitute a reasonable and necessary measure aimed at preventing or repressing the infraction. Commanders are under a duty to report infractions to the competent authorities as is specifically provided for both by the SFRY [Socialist Federal Republic of Yugoslavia] regulations concerning the application of the international law of war, and by Article 87(1) of Additional Protocol I, and by Article 86(2) of Additional Protocol I. Notably, this duty is present even in circumstances where the commander may not exercise effective control over the perpetrators of the infractions concerned such that he can punish them.”

“The Appeals Chamber is convinced beyond reasonable doubt that the Appellant, notwithstanding his knowledge that detention-related crimes had been committed in the Vitez Cultural Centre and the Vitez veterinary hospital, failed to punish those subordinates of his who were responsible, and over whom he was able to exercise effective control, and he failed to report the infractions of which he was aware to the competent authorities. The Appellant is, accordingly, guilty under Count 15 of grave breaches of the Geneva Conventions (inhuman treatment) pursuant to Articles 2(b) and 7(3) of the Statute.”

VII) AFFIRMATIVE DEFENSES

a) “Alibi” defense

Delalic, (Appeals Chamber) February 20, 2001, para. 581: “It is a common misuse of the word to describe an alibi as a ‘defence.’ If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 11: “In the present case, one Accused, Haradin Bala, relies in part on an alibi defence. So long as there is a factual foundation in the evidence for that alibi, the Accused bears no onus to establish that alibi; it is for the Prosecution to ‘eliminate any reasonable possibility that the evidence of alibi is true.’ Further, as has been held by another Trial Chamber, a finding that an alibi is false does not in itself ‘establish the opposite to what it asserts.’ The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment.”

Vasejčević, (Trial Chamber) November 29, 2002, para. 15: “When a ‘defence’ of alibi is raised by an accused person, the accused bears no onus of establishing that alibi. The onus is on the Prosecution to eliminate any reasonable possibility that the evidence of alibi is true.”

See also “Accused’s reliance on the alibi defense does not alter the burden of proof,” Section (X)(b)(i)(4), ICTY Digest.

b) Duress does not afford a complete defense

Prosecutor v. Erdemović, Case No. IT-96-22 (Appeals Chamber), October 7, 1997, para. 19: “For the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah and in the Separate and Dissenting Opinion of Judge Li, the majority of

the Appeals Chamber finds that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, paras. 55, 66, 72, 75, 88: The justices held that “no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings.” In the absence of a customary rule, the justices examined “the general principles of law recognized by civilised nations” and held that there is “a general principle of law recognised by civilised nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress,” with the term “duress” meaning “imminent threats to the life of an accused if he refuses to commit a crime.” However, the justices held that “[i]t is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons.” The justices expressed concern that “in relation to the most heinous crimes known to humankind, the principles of law to which we [the ICTY] give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations,” and concluded that “international law . . . cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale.” The justices held that “duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.”

Erdemovic, (Appeals Chamber), Separate and Dissenting Opinion of Judge Li, October 7, 1997, paras. 3, 4, 5: “National laws and practices of various States on this question [regarding the proper legal evaluation of duress] are . . . divergent, so that no general principle of law recognised by civilised nations can be deduced from them.” “As no general principle of law can be found on the question, recourse is to be had to the decisions of Military Tribunals, both international and national, which apply international law.” Judge Li then looked to the Judgment of the International Military Tribunal at Nürnberg of 1946 which held “[t]hat a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though . . . the order may be urged in mitigation of the punishment.”

Analyzing the post-Nürnberg World War II cases of *Flick*, *I.G. Farben*, and *Krupp* held pursuant to Control Council Law No. 10, Judge Li found “as a general rule, duress can be a complete defence if the following requirements are met, (a) the act was done to

avoid an immediate danger both serious and irreparable, (b) there was no other adequate means to escape, and (c) the remedy was not disproportionate to evil.” Judge Li also found, based on additional cases, an exception to the general rule “if the act was a heinous crime, for instance, the killing of innocent civilians or prisoners of war, duress cannot be a complete defence, but can only be a ground of mitigation of punishment if justice requires.”

See also discussion of duress as a mitigating factor, Section (IX)(c)(iv)(3)(e), ICTY Digest.

c) *Tu quoque* principle rejected: the argument that the adversary committed similar crimes is not a valid defense

Limaj et al., (Trial Chamber), November 30, 2005, para. 193: “[T]he Chamber would emphasise at the outset that the existence of an attack from one side involved in an armed conflict against the other side’s civilian population does not justify an attack by that other side against the civilian population of its opponent. The *tu quoque* principle has no application.”

Kupreskic et al., (Trial Chamber), January 14, 2000, paras. 51, 515-520: The argument at issue “amount[s] to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent.” However, “the *tu quoque* defence has no place in contemporary international humanitarian law.” The Trial Chamber rejected the *tu quoque* principle as it is “fallacious and inapplicable” in international humanitarian law. It has been “universally rejected” and “flawed in principle” since “[i]t envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations.” Rather, “the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity.”

d) Involvement in defensive operation is not a defense

Kordic and Cerkez, (Trial Chamber), February 26, 2001, paras. 448-452: “[T]he involvement of a person in a ‘defensive operation’ does not ‘in itself’ constitute a ground for excluding criminal responsibility.”

e) Diminished mental responsibility is not a defense

Vasiljevic, (Trial Chamber), November 29, 2002, para. 282: “[T]he issue of diminished mental responsibility is relevant only to the sentence to be imposed. It is not a defence that if established would lead to the acquittal of the Accused.”

Delalic et al., (Appeals Chamber), February 20, 2001, para. 590: “The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the

common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense."

See also discussion of diminished mental responsibility as a mitigating factor, Section (IX)(c)(v)(3)(g), ICTY Digest.

VIII) JURISDICTION

a) Generally

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paras. 2, 36, 40, 47, 64, 145-146: Dusko Tadic challenged the jurisdiction and the lawfulness of the existence of the ICTY on three different grounds: (1) illegal foundation of the ICTY; (2) wrongful primacy of the ICTY over national courts; and (3) lack of subject-matter jurisdiction. The Appeals Chamber found that the ability of a judicial or arbitral tribunal "to determine its own jurisdiction" is "a major part, of [its] incidental or inherent jurisdiction." The Appeals Chamber held that the establishment of the ICTY fell squarely within the powers of the Security Council under Article 41 of the United Nations Charter, that the ICTY had been lawfully established as a measure under Chapter VII of the Charter and that the ICTY had been "established by law." The Appeals Chamber determined that there had been a threat to the peace in the former Yugoslavia justifying the Security Council's invocation of Chapter VII of the Charter and, further, that Article 41 of Chapter VII served as an appropriate legal basis for establishing an international criminal tribunal. The Appeals Chamber dismissed the second ground of Tadic's appeal as ill-founded and held that the tribunal had subject-matter jurisdiction over the case at hand.

b) Alleged illegal arrest did not deprive the Tribunal of jurisdiction

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 22, 30-32: "On 17 May 2001, the defence for Dragan Nikolic (hereinafter 'Defence') filed a motion challenging the jurisdiction of the Tribunal pursuant to Rule 72 (A) (i) of the Rules mainly based upon the allegedly illegal arrest of the Accused. The Defence submitted that the allegedly illegal arrest of the Accused by unknown individuals on the territory of what was at that time the Federal Republic of Yugoslavia (hereinafter 'FRY') should be attributable to [the Multinational Stabilization Force ('SFOR')] and the Prosecution, thereby, according to the Defence, barring the Tribunal from exercising its jurisdiction over the Accused. SFOR had arrested him on the territory of [Bosnia and Herzegovina] after he had been handed over by these unknown individuals. The Defence further submitted that, irrespective of whether or not this was attributable to the Prosecution,

the illegal character of the arrest should in and of itself bar the Tribunal from exercising jurisdiction, by not applying the disputed maxim '*male captus, bene detentus*.'"

"The Appeals Chamber dismissed the interlocutory appeal in its decision of 5 June 2003. First, the Appeals Chamber held that, even if the conduct of the unknown individuals could be attributed to SFOR, thus making SFOR responsible for a violation of State sovereignty, there was no basis upon which the Tribunal should not exercise its jurisdiction in the present case. The Appeals Chamber weighed the 'legitimate expectation that those accused of [universally condemned offences] will be brought to justice [...] against the principle of State sovereignty and the fundamental human rights of the accused' and stated that

the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved. [In this case] the State whose sovereignty has allegedly been breached [Serbia and Montenegro] has not lodged any complaint and thus has acquiesced in the International Tribunal's exercise of jurisdiction. *A fortiori*, [...] the exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals whose actions [...] do not necessarily in themselves violate State sovereignty."

"Second, the Appeals Chamber defined the circumstances in which a human rights violation could vitiate the exercise of jurisdiction:

[C]ertain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. [...] Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the Accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."

"The Appeals Chamber concurred with the Trial Chamber's evaluation on the gravity of the alleged violation of the Accused's human rights:

[T]he evidence [presented] does not satisfy the Appeals Chamber that the rights of the Accused were egregiously violated in the process of his arrest. Therefore, the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction."

IX) CHARGING, CONVICTIONS AND SENTENCING

a) Cumulative charging

i) cumulative charging permitted

Delalić et al., (Appeals Chamber), February 20, 2001, para. 400: “Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 718: “Cumulative charging is permissible according to the practice of the Tribunal, as a Trial Chamber is in a position to evaluate the charges to be retained only after the presentation of the evidence.”

b) Cumulative and concurrent convictions

i) cumulative convictions based on same conduct permitted only where each crime involves a materially distinct element

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1032: “Whether the same conduct violates two distinct statutory provisions is a question of law. In *Celebić* [a/k/a *Delalić*], the Appeals Chamber articulated a two-pronged test to be applied to the question of cumulative convictions, which has been consistently followed by the International Tribunal and the International Criminal Tribunal for Rwanda. It held [as to the first prong] that:

reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1033: “The Appeals Chamber will permit multiple convictions for the same act or omission where it clearly violates multiple distinct provisions of the Statute, where each statutory provision contains a materially distinct element not contained in the other(s), and which element requires proof of a fact which the elements of the other statutory provision (s) do not. The cumulative convictions test serves twin aims: ensuring that the accused is convicted

only for distinct offences, and at the same time, ensuring that the convictions entered fully reflect his criminality.”

Krstić, (Appeals Chamber), April 19, 2004, para. 218: “The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other.” See also *Kumarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 173 (similar); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 717 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 799 (same as *Limaj*); *Širugar*, (Trial Chamber), January 31, 2005, para. 447 (same as *Limaj*); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1084 (similar); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 115 (similar); *Galić*, (Trial Chamber), December 5, 2003, para. 158 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 1057 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 869 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 718 (similar).

Delalić et al., (Appeals Chamber), February 20, 2001, paras. 405, 412: The Appeals Chamber noted that “multiple convictions based on the same acts have sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase,” but held that “reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.”

ii) an element is materially distinct from another if it requires proof of a fact not required by the other

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1032: “In *Celebici* [a/k/a *Delalić*], the Appeals Chamber . . . [stated:] ‘An element is materially distinct from another if it requires proof of a fact not required by the other.’” See also *Krstić*, (Appeals Chamber), April 19, 2004, para. 218 (same); *Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 412 (same); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 799 (same); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1084 (same); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 115 (same); *Galić*, (Trial Chamber), December 5, 2003, para. 158 (same); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 1057 (same); *Stakić*, (Trial Chamber), July 31, 2003, para. 869 (same).

iii) determination of whether each provision contains a materially distinct element is a question of law

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1033: “When applying the *Celebici* [a/k/a *Delalić*] test [as to whether cumulative convictions are permissible],

what must be considered are the legal elements of each offence, not the acts or omissions giving rise to the offence. What each offence requires, as a matter of law, is the pertinent inquiry.”

Krstić, (Appeals Chamber), April 19, 2004, para. 226: “As the Appeals Chamber explained, the inquiry into whether two offences are impermissibly cumulative is a question of law. The fact that, in practical application, the same conduct will often support a finding that the perpetrator intended to commit both genocide and extermination does not make the two intents identical as a matter of law.”

iv) when making the determination, look to the elements of the offense, including *chapeau* requirements

Stakić, (Trial Chamber), July 31, 2003, para. 869: “The legal prerequisites describing the circumstances of the relevant offences as stated in the *chapeau* of the relevant Articles of the Statute constitute elements for the purpose of applying this test [as to whether each provision contains a materially distinct element].”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 718: “In determining whether a provision contains a materially distinct element, all the elements of the offence are to be taken into account, including the *chapeau* requirements.”

v) where both crimes do not have a materially distinct element, convict under the more specific provision

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1032: “In *Celebici* [a/k/a *Delalić*], the Appeals Chamber . . . [stated:] ‘Where this test [that each offense has a materially distinct element not contained in the other] is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.’” See also *Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 413 (same); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 717 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 447 (same as *Limaj*); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1084 (same as *Limaj*); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 115 (same as *Kordić*); *Galic*, (Trial Chamber), December 5, 2003, para. 158 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 1057 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 869 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 718 (same as *Limaj*).

Krstić, (Appeals Chamber), April 19, 2004, para. 218: “Where this test [that each offense has a materially distinct element not contained in the other] is not met, only the

conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 799 (same).

Compare Stakic, (Trial Chamber), July 31, 2003, para. 870: “While this Chamber feels bound by the decisions of the Appeals Chamber, it favours the further limitation of cumulative convictions. The guiding principle in these circumstances would be for the Chamber, in the exercise of its discretion, to convict only in relation to the crime that most closely and most comprehensively reflects the totality of the accused’s criminal conduct.” See also *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 116 (similar).

vi) cumulative conviction issue does not arise where crimes involve different conduct

Limaj et al., (Trial Chamber), November 30, 2005, para. 720: “In the instant case, the issue of cumulation does not arise in relation to the offences of torture . . . and of murder . . . as these offences are not based upon the same criminal conduct. The same can be said for the offences of cruel treatment . . . and of murder . . .”

Galic, (Trial Chamber), December 5, 2003, para. 164: “The counts of murder and inhumane acts as crimes against humanity are not based upon the same criminal conduct. They seek to punish, respectively, murder of civilians through sniping and shelling attacks (Article 5(a) of the Statute), and other harm suffered by civilians through sniping and shelling attacks, in particular serious injury (Article 5(i) of the Statute). Therefore the issue of cumulative convictions does not arise.”

vii) cumulative convictions of themselves involve additional punishment

Mucic et al., (Appeals Chamber), April 8, 2003, para. 25: “It may be accepted that the cumulative convictions of themselves involve an additional punishment – not only by reason of the social stigmatisation inherent in being convicted of that additional crime, but also the risk that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend to some extent upon the number or nature of the convictions entered. The quashing of the cumulative convictions undoubtedly removed the punishment involved in the additional convictions themselves.”

See also “discretion to impose concurrent, consecutive, a mixture of concurrent and consecutive, or single sentence, but must reflect ‘totality’ of the criminal conduct,” Section (IX)(c)(vii)(4), ICTY Digest.

- viii) cumulative convictions important to sentencing, stigma, early release, describing the full culpability of the accused and providing a complete picture of the totality of the accused's conduct

Krstić, (Appeals Chamber), April 19, 2004, para. 217: “[T]he import of cumulative convictions is not limited to their impact on the sentence. Cumulative convictions impose additional stigma on the accused and may imperil his eligibility for early release. On the other hand, multiple convictions, where permissible, serve to describe the full culpability of the accused and to provide a complete picture of his criminal conduct.”

ix) application—cumulative convictions

(1) cumulative convictions permissible under Articles 3 and 5

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1036: “[T]he Appeals Chamber has recognised that convictions for the same conduct under Article 3 (laws or customs of war) and Article 5 (crimes against humanity) of the Statute are permissible. Following the *Celebić* [a/k/a *Delalić*] test, the Appeals Chamber has consistently held that crimes against humanity constitute crimes distinct from violations of the laws or customs of war in that each contains an element not present in the other:

Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible.

It is therefore settled law that cumulative convictions under Articles 3 and 5 are permissible.” See also *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 170 (similar); *Jelić*, (Appeals Chamber), July 5, 2001, para. 82 (similar to quoted language); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 800 (similar to quoted language); *Brđanin*, (Trial Chamber), September 1, 2004, para. 1086 (same as *Blagojević*); *Stakić*, (Trial Chamber), July 31, 2003, para. 874 (similar); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 503 (similar).

(a) application to crimes under Articles 3 and 5

See *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 170 (murder under Article 3 and any other crime under Article 5 permissible); *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 145 (murder under Article 3 and persecution under Article 5 permissible); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 800 (murder under Article 3 and murder under Article 5 permissible); *Stakić*, (Trial Chamber), July 31, 2003, para. 875 (same); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 801 (murder under Article 3 and extermination under Article 5 permissible); *Stakić*, (Trial Chamber), July 31,

2003, para. 878 (same); *Galic*, (Trial Chamber), December 5, 2003, para. 163 (terror under Article 3 and murder and inhumane acts under Article 5 permissible); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 503 (cruel treatment under Article 3 and persecution under Article 5 permissible).

(2) cumulative convictions permissible under Articles 2 and 5

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1037: “[C]onvictions under Articles 2 and 5 are also permissibly cumulative. While Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population, Article 2 requires proof of a nexus between the acts of the accused and the existence of an international armed conflict as well as the protected persons status of the victims under the Geneva Conventions.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1087: “Convictions based upon the same conduct for charges brought under Articles 2 and 5 of the Statute are permissibly cumulative as each Article contains materially distinct elements in the *chapeau* requirements. While Article 2 requires the existence of an international armed conflict and that the victims of the alleged offences be protected persons under the 1949 Geneva Conventions, Article 5 requires that there be a widespread or systematic attack directed against a civilian population.”

(a) application to crimes under Articles 2 and 5

See *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1037 (inhuman treatment under Article 2 and other inhumane acts under Article 5 permissible); *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1037 (unlawful confinement under Article 2 and imprisonment under Article 5 permissible).

(3) cumulative convictions under Articles 2 and 3

(a) application—willful killing under Article 2 and murder under Article 3 impermissible

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1035: “With regard to cumulative convictions under Article 2 (grave breaches of the Geneva Conventions of 1949) and Article 3 (violations of the laws or customs of war) of the Statute, the Appeals Chamber has specifically held that willful killing under Article 2(a) of the Statute contains a materially distinct element not present in the crime of murder under Article 3 of the Statute, namely that the victim be a protected person, an element which requires proof of a fact not required by the elements of murder under Article 3. The definition of a protected person includes and goes beyond what is meant by an individual taking no active part in the hostilities, which is the terminology of the Geneva Conventions. Since

murder under Article 3 of the Statute does not contain an element in addition to the elements of wilful killing under Article 2, application of the second prong of the *Celebici* [a/k/a *Delalić*] test is required, namely to uphold the conviction under the more specific provision. Because wilful killing under Article 2 contains an additional element, it is the more specific provision. Thus, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed as impermissibly cumulative.”

(b) application—inhuman treatment under Article 2 and cruel treatment under Article 3 impermissible

Blaskić, (Appeals Chamber), July 29, 2004, para. 671: “The Appeals Chamber has . . . considered the sole distinguishing element between Article 2 (inhuman treatment) and Article 3 (cruel treatment): that the former contains the protected person status of the victim as an element not present in the latter. Also considered . . . is the definition of ‘protected person’ provided by Article 4 of Geneva Convention IV and how it has been extended to the apply to bonds of ethnicity. The Appeals Chamber considers that the Bosnian Muslim detainees used as human shields were protected persons for the purposes of this distinction. A conviction for cruel treatment under Article 3 does not require proof of a fact not required by Article 2; hence the Article 3 conviction under Count 20 must be dismissed.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 634 (similar).

(c) cumulative convictions under Articles 3 and 5 impermissible where would result in an impermissibly cumulative conviction between Articles 2 and 3

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 1038: “The question of whether convictions for murder (under Articles 3 and 5(a) of the Statute respectively) and for wilful killing (Article 2(a) of the Statute) are permissible, was considered by the Trial Chamber in this case. It found that the offences under Articles 2 and 5 each contain an additional element not required by the other (thereby permitting cumulative convictions) but that the Article 3 offence does not contain an additional required element and is, accordingly, subsumed. The Appeals Chamber agrees that while cumulative convictions under Articles 3 and 5 are permissible, in circumstances where such convictions would result in an impermissibly cumulative conviction with Article 2, the Article 3 crime must fall away.”

(4) cumulative convictions under Articles 4 and 5

(a) application—genocide under Article 4 and extermination under Article 5 permissible

Krstić, (Appeals Chamber), April 19, 2004, paras. 220, 222-223, 225-227: “This issue [of whether there may be convictions for both genocide and extermination as a crime against humanity] was confronted by the ICTR Appeals Chamber in *Musema*. There, the Appeals Chamber arrived at a conclusion contrary to the one reached by the Trial Chamber in this case. Echoing the Prosecution’s argument here, the ICTR Appeals Chamber permitted convictions for genocide and extermination based on the same conduct because ‘[g]enocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, [which] is not required by extermination,’ while ‘[e]xtermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide.’”

“As the Trial Chamber correctly acknowledged, the intent requirement of genocide is the intent to destroy, in whole or in part, a group enumerated both in Article 4 and in the Genocide Convention. This intent differs in several ways from the intent required for a conviction for extermination.” “The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide.”

“The Trial Chamber also concluded that the definitions of intent for extermination and genocide ‘both require that the killings be part of an extensive plan to kill a substantial part of a civilian population.’” “As neither extermination nor genocide requires the proof of a plan or policy to carry out the underlying act, this factor cannot support the Trial Chamber’s conclusion that the offence of extermination is subsumed in genocide.” “[T]he intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians.” “The Trial Chamber’s conclusion that convictions for extermination under Article 5 and genocide under Article 4 are impermissibly cumulative was, accordingly, erroneous.”

(b) application—genocide under Article 4 and persecution under Article 5 permissible

Krstić, (Appeals Chamber), April 19, 2004, paras. 228-229: “The Prosecution . . . argues that the Trial Chamber erred in setting aside Krstić’s conviction for persecution under Article 5 for the crimes resulting from the killings of Bosnian Muslims of Srebrenica. The Trial Chamber concluded, for the same reasons it disallowed the conviction for extermination, that the offence of persecution as a crime against humanity was impermissibly cumulative with the conviction for genocide.” “Persecution and extermination, as crimes against humanity under Article 5, share the requirement that the

underlying act form a part of a widespread or systematic attack against a civilian population and that it be perpetrated with the knowledge of that connection. The analysis above concerning extermination therefore applies also to the relationship between the statutory elements of persecution and genocide. The offence of genocide does not subsume that of persecution. The Trial Chamber's conclusion to the contrary was erroneous."

(5) cumulative convictions within Article 3

(a) application to crimes within Article 3

See *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 719 (torture and cruel treatment both under Article 3 impermissible); *Strugar*, (Trial Chamber), January 31, 2005, paras. 449-451 (murder, cruel treatment and attacks on civilians all under Article 3 impermissible); *Strugar*, (Trial Chamber), January 31, 2005, paras. 452-455 (devastation not justified by military necessity, unlawful attacks on civilian objects, and destruction or willful damage of cultural property all under Article 3 impermissible); *Galic*, (Trial Chamber), December 5, 2003, paras. 160-162 (terror and attack on civilians under Article 3 impermissible).

(6) cumulative convictions within Article 4

(a) application—may not convict for genocide and complicity in genocide for the same acts

Brđjanin, (Trial Chamber), September 1, 2004, para. 728: "[A]n accused may not be convicted of genocide and complicity in genocide for the same acts."

(7) cumulative convictions within Article 5

(a) persecution and other crimes generally permissible

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 1039-1040: "It has previously been held in *Krnjelac*, *Vasiljević*, and *Krstić*, that *intra*-Article 5 convictions under the Statute for persecutions as a crime against humanity with other crimes against humanity found in that Article, are impermissibly cumulative. In *Vasiljević* and *Krstić*, the Appeals Chamber stated that the appellant could not be convicted both for murder and persecutions under Article 5(a) and (h) of the Statute, on the basis of the same acts. It was reasoned that where a charge of persecutions is premised on murder and is proven, the Prosecution need not prove an additional fact in order to secure the conviction for murder because the offence is subsumed by the offence of persecutions, which requires proof of a materially distinct element of discriminatory intent in the commission of the act. Similarly, the Appeals Chamber in these cases, as well as in *Krnjelac*, held that

convictions for persecutions under Article 5(h) and for other inhumane acts under Article 5(i) on the basis of the same conduct are impermissibly cumulative ‘since the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts.’”

“The Appeals Chamber considers that cogent reasons warrant a departure from this jurisprudence as an incorrect application of the *Celebici* [a/k/a *Delalić*] test to *intra*-Article 5 convictions. These cases are in direct contradiction to the reasoning and proper application of the test by the Appeals Chambers in *Jelić*, *Kupreskić*, *Kunarac*, and *Musema*. As stated above, the Appeals Chamber in *Celebici* expressly rejected an approach that takes into account the actual conduct of the accused as determinative of whether multiple convictions for that conduct are permissible. Rather, what is required is an examination, as a matter of law, of the elements of each offence in the Statute that pertain to that conduct for which the accused has been convicted. It must be considered whether each offence charged has a materially distinct element not contained in the other; that is, whether each offence has an element that requires proof of a fact not required by the other offence.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 804-807, 810: “The Appeals Chamber has until recently held that convictions for both persecutions, a crime against humanity pursuant to Article 5 of the Statute, and another crime under Article 5 of the Statute, on the basis of the same acts, were not permissible. The *Vasiljević* Appeals Chamber held that it is impermissible to enter a conviction for persecutions and convictions for murder and inhumane acts under Article 5, when the conviction for persecutions is based on these acts. The Appeals Chamber stated that:

the Trial Chamber found that persecution under Article 5(h) of the Statute [...] requires the materially distinct elements of a discriminatory act and a discriminatory intent and is therefore *more specific* than murder as a crime against humanity under Article 5(a) of the Statute [...] and inhumane acts as a crime against humanity under Article 5(i) of the Statute [...]. The Appeals Chamber finds the Appellant guilty of aiding and abetting [...] the crime of persecution under Article 5(h) of the Statute by way of murder of the five Muslim men [...].”

“The same result was reached by the Appeals Chamber in *Krnjelac*, which concluded that ‘the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts.’” “This same approach was confirmed in *Krstić*”

“The *Kordić and Čerkez* Appeals Chamber, however, departed from this jurisprudence, and held that cumulative convictions for persecutions, as a crime against humanity pursuant to Article 5 of the Statute and another crime under Article 5 of the Statute, if both convictions are based on the same criminal conduct, are permissible. The Appeals Chamber considered that ‘cogent reasons’ warranted a departure from the above-mentioned jurisprudence”

“Recalling the binding force of decisions of the Tribunal’s Appeals Chamber upon the Trial Chambers, and in light of the latest pronouncement of the Appeals

Chamber, this Trial Chamber finds that convictions for murder under Article 5 . . . and for persecutions based on the underlying act of murder . . . , when both convictions are based on the same acts, are in principle permissible. Similarly, convictions for other inhumane acts (forcible transfer) under Article 5 . . . and for persecutions based on the underlying act of forcible transfer . . . are also in principle permissible.”

But see Kordić and Cerkez (Appeals Chamber), Joint Dissenting Opinion of Judge Schomburg and Judge Guey on Cumulative Convictions, December 17, 2004, para. 1: “[W]e respectfully disagree with the decision of the majority that a conviction for persecutions, a crime against humanity pursuant to Article 5 of the Statute, can be cumulated with another conviction under Article 5 of the Statute, if both convictions are based on the same criminal conduct. We believe that the decisions of the Appeals Chamber in *Krnjelac*, *Vasiljević*, and *Krstić*, according to which *intra*-Article 5 convictions for persecutions with other crimes against humanity found in that Article are impermissibly cumulative, are based on a correct application of the *Celebici* [a/k/a *Delalić*] test. Therefore, we fail to see any cogent reason allowing for a departure from this jurisprudence.”

(b) application to crimes within Article 5

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1043 (persecution and imprisonment under Article 5 permissible); *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1041 (murder and persecution under Article 5 permissible); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 810 (same); *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1042 (persecution and other inhumane acts under Article 5 permissible); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 810 (same); *Stakić*, (Trial Chamber), July 31, 2003, paras. 876, 877 (extermination and murder under Article 5 permissible).

But see Krstić, (Appeals Chamber), April 19, 2004, paras. 231-233 (disallowing murder and persecution perpetrated through murder, also disallowing inhumane acts and persecution based on inhumane acts); *Vasiljević*, (Appeals Chamber), February 25, 2004, para. 88 (conviction for persecution entered, but not for murder and inhumane acts); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 802-803 (extermination and murder both under Article 5 impermissible); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1085 (“torture, deportation and inhumane acts (forcible transfer) brought under Article 5 of the Statute are impermissibly cumulative with convictions for charges of persecution”); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 1058 (both persecution and deportation impermissible); *Stakić*, (Trial Chamber), July 31, 2003, para. 879: “persecution and crimes other than persecution” impermissible”); *Krnjelac*, (Trial Chamber), March 15, 2002, para. 503 (“neither the crime of imprisonment nor that of inhumane acts contains an element which is materially distinct from the crime of persecution.”)

(8) concurrent convictions under Article 7(1) and Article 7(3)

(a) not a question of cumulative convictions but concurrence between two modes of responsibility

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1030: Regarding conviction pursuant to Articles 7(1) and 7(3) of the Statute, “[t]he Appeals Chamber notes that this is not a question of cumulative convictions, but rather a question of concurrence between two modes of responsibility”

(b) inappropriate to convict under both Article 7(1) and Article 7(3) where based on same conduct; if both proven, convict under Article 7(1)

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, paras. 22-23: “The Appeals Chamber notes that the Prosecution suggests that . . . ‘the Appellant was sentenced for his role on 6 December 1991 under both Article 7(1) (aiding and abetting) and 7(3) (superior responsibility) [of the Statute] in relation to identical conduct’” “The relevant paragraphs of the *Blaskić* Appeal Judgement read as follows:

The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only”

“The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts [...] constitutes a legal error invalidating the Trial Judgement in this regard.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 91 (quoted language); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 285 (same quoted language).

Kročka et al., (Appeals Chamber), February 28, 2005, para. 104: “[I]t is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute for the same crime. Where the legal requirements of both forms of responsibility are met, a conviction should be entered on the basis of Article 7(1) only” *See also Stakić*, (Trial Chamber), July 31, 2003, paras. 463-464 (similar).

Krstić, (Trial Chamber), August 2, 2001, para. 605: “[T]he Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by ‘planning,’ ‘instigating’ or ‘ordering’ the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the

commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.” (emphasis in original)

Compare Brđjanin, (Trial Chamber), September 1, 2004, para. 284: “While there have been cases where a conviction has been entered for the same count pursuant to both Article 7(1) and Article 7(3), there have been others where a Trial Chamber exercised its discretion to enter a conviction under only one of these heads of responsibility, even when it was satisfied that the legal requirements for entering a conviction pursuant to the second head of responsibility were fulfilled. In such cases, the Trial Chamber entered a conviction under the head of responsibility that it believed better characterised the criminal conduct of the accused.” See also *Galic*, (Trial Chamber), December 5, 2003, para. 177 (similar to last sentence).

(c) take into account that both types of responsibility were proven in sentencing

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 23: “[T]he *Blaskić* Appeal Judgement read[s] as follows:

Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused’s superior position as an aggravating factor in sentencing.”

See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 104 (similar).

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 33: “In the *Celebić* [a/k/a *Delalić*] Appeal Judgement, the Appeals Chamber stated:

Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility [. . .] or the accused’s seniority or position of authority aggravating his direct responsibility under Article 7(1).”

(emphasis in original) *Blaskić*, (Appeals Chamber), July 29, 2004, para. 90 (same); *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 34 (similar); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 91 (same); *Delalić et al.* (Appeal Chamber), February, 20, 2001, para. 745 (same quoted language).

Stakić, (Trial Chamber), July 31, 2003, para. 465: “Article 7(3) serves primarily as an omnibus clause in cases where the primary basis of responsibility can not be applied. In

cases where the evidence leads a Trial Chamber to the conclusion that specific acts satisfy the requirements of Article 7(1) and that the accused acted as a superior, this Trial Chamber shares the view of the *Krnjelac* Trial Chamber that a conviction should be entered under Article 7(1) only and the accused's position as a superior taken into account as an aggravating factor." *See also Stakić*, (Trial Chamber), July 31, 2003, para. 912 (similar).

Compare Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 81: "As held by the *Celebići* [a/k/a *Delalić*] and *Aleksovski* Appeal Judgements the form of responsibility, which was not chosen, must be considered as aggravating circumstance, because the final sentence should reflect the totality of the culpable conduct."

(d) not necessary to make Article 7(3) findings where Article 7(1) responsibility proven beyond a reasonable doubt

Galić, (Trial Chamber), December 5, 2003, para. 750: "Having found that General Galić is guilty of the crimes proved at trial under Article 7(1) of the Statute, the Majority does not deem it necessary to pronounce on whether General Galić is cumulatively guilty under Article 7(3) of the Statute."

Stakić, (Trial Chamber), July 31, 2003, para. 466: "[I]t is in general not necessary in the interests of justice and of providing an exhaustive description of individual responsibility to make findings under Article 7(3) if the Chamber is already satisfied beyond reasonable doubt of both responsibility under 7(1) and the superior positions held by the accused. . . . [I]t would be a waste of judicial resources to enter into a debate on Article 7(3) knowing that Article 7(1) responsibility subsumes Article 7(3) responsibility."

(e) where accused acquitted under Article 7(1) must consider Article 7(3) responsibility

Stakić, (Trial Chamber), July 31, 2003, para. 467: "[W]hen an accused is found not guilty under Article 7(1) in relation to a particular charge, the mode of individual responsibility under Article 7(3) must be considered."

(f) permissible to convict under both Article 7(1) and Article 7(3) where based on different conduct

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 25: "[T]he *Blaskić* principle [of convicting under Article 7(1) and not Article 7(3) where the underlying conduct is the same] . . . does not bar simultaneous convictions under Articles 7(1) and 7(3) of the Statute if they are based on different conduct."

(g) application—concurrent convictions under Article 7(1) and Article 7(3)

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, paras. 24-25, 27, 31: The conviction under Article 7(3) was vacated where the convictions for individual and superior responsibility were based on the same facts.

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 33: “In the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused’s ‘superior responsibility as a warden seriously aggravated [his] offences’ in relation to those offences of which he was convicted for his direct participation. While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 35: “[C]oncurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same . . . facts . . . constitutes a legal error invalidating the Trial Judgement in this regard.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 92 (same).

c) Sentencing

i) instruments governing sentencing

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 6: “The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules of Procedure and Evidence (“Rules”).” See also *Đeronjić*, (Appeals Chamber), July 20, 2005, para. 6 (same); *Babić*, (Appeals Chamber), July 18, 2005, para. 5 (same); *Kročka et al.*, (Appeals Chamber), February 28, 2005, para. 668 (similar); *Nikolić - Dragan*, (Appeals Chamber), Case No. IT-94-2-A, February 4, 2005, para. 6 (same); *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1073 (similar); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 678 (same); *Krstić*, (Appeals Chamber), April 19, 2004, para. 241 (same).

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 6: “Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber to take into account in sentencing” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 723; *Strugar*, (Trial Chamber), January 31, 2005, para. 458; *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 826; *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1089; *Mrdja*, (Trial Chamber), March 31, 2004, para. 11; *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, paras. 142, 143; *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 95; *Stakić*, (Trial Chamber), July 31, 2003, para. 884; *Simić* -

Milan, (Trial Chamber), October 17, 2002, paras. 32, 1060 (all invoking Article 24 and Rule 101).

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 79, 80, 81: “Article 24 of the Statute prescribes the possible penalties upon conviction before the Tribunal and the factors to be taken into account in determining the sentence of an accused.” “Rules 100 and 101 of the Rules are the provisions applicable to the penalty of imprisonment.” “Article 27 of the Statute is the applicable provision for the enforcement of sentences.” “[T]he competence and procedure for pardon or commutation of sentences is defined in Article 28 of the Statute.”

See also *Bralo*, (Trial Chamber), December 7, 2005, paras. 18-19 (invoking Articles 24 and 27, and Rules 100 and 101); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, paras. 811-813 (invoking Articles 24 and 27, and Rule 101); *Babic*, (Trial Chamber), June 29, 2004, para. 43 (invoking Articles 23 and 24, and Rules 87 (C) and 101); *Obrenovic*, (Trial Chamber), December 10, 2003, paras. 42, 43, 44 (invoking Articles 24, 27 and 28, and Rules 100 and 101); *Galic*, (Trial Chamber), December 5, 2003, para. 756 (invoking the Statute and Rules 87 (C) and 101).

(1) ICTY Statute, Article 24: Penalties

“1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”

(2) Rule 101 of the Rules of Procedure and Evidence, ICTY

“(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

- (i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”

(3) Rule 100 of the Rules of Procedure and Evidence, ICTY

“(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).”

For the language of additional articles of the ICTY Statute and rules of the Rules of Procedure and Evidence, see those documents.

ii) generally

(1) overview of sentencing factors

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 6: “Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber that amount to an obligation to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct, the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the former Yugoslavia, and aggravating and mitigating circumstances.” *See also Deronjic*, (Appeals Chamber), July 20, 2005, para. 6 (same); *Babic*, (Appeals Chamber), July 18, 2005, para. 5 (same factors); *Krstic*, (Appeals Chamber), April 19, 2004, para. 267 (same factors); *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 7 (similar); *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 89 (same factors); *Bralo*, (Trial Chamber), December 7, 2005, para. 23 (same factors); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 723 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 458 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 826 (same

factors are “[among the factors included]”; *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1089 (“A Trial Chamber is obliged to take into account such factors”); *Babić*, (Trial Chamber), June 29, 2004, paras. 47, 49 (same factors); *Mrdja*, (Trial Chamber), March 31, 2004, para. 12 (similar factors must be taken into account); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, para. 38 (similar factors); *Obrenović*, (Trial Chamber), December 10, 2003, para. 55 (same factors “are not exhaustive, but provide guidance”); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 95 (listing same factors as but noting they “are not exhaustive”); *Banović*, (Trial Chamber), October 28, 2003, para. 32 (similar factors); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, paras. 1060-1061 (same factors); *Simić - Milan*, (Trial Chamber), October 17, 2002, para. 32 (similar factors).

Kročka et al., (Appeals Chamber), February 28, 2005, para. 668: “Trial Chambers are obliged to take these provisions [Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules] into account when determining a sentence. However, they do not amount to ‘binding limitations on a Chamber’s discretion to impose a sentence.’ While there is no definitive list of sentencing guidelines, the Appeals Chamber has previously noted:

The combined effect of Article 24 of the Statute and Rule 101 of the Rules is that, in imposing a sentence, the Trial Chamber shall consider the following factors: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offences or totality of the conduct; (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; (iv) credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal; and (v) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.”

See also Blaskić, (Appeals Chamber), July 29, 2004, para. 679 (quoted language); *Kordić and Čerkez*, (Appeals Chamber), December 17, 2004, para. 1084 (similar factors).

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 89: “The special context of a plea agreement raises an additional factor that must be taken into account. The plea agreement is a matter of considerable importance as it involves an admission by the accused of his guilt.”

Đeronjić, (Trial Chamber), March 30, 2004, para. 138: “The Statute explicitly vests the judges with discretion to determine the appropriate punishment for each accused and each act charged. Thus, when the Trial Chamber evaluates the different sentencing factors, it does so in the interest of the nature and gravity of the crimes committed, the circumstances surrounding the acts themselves, the degree of responsibility of an accused for the act, and the personality of the accused.” *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 125 (same).

See also “miscellaneous principles regarding sentencing,” Section (IX)(c)(vii), ICTY Digest.

(a) sentencing factors are to be considered, but ultimate sentence is a matter for the discretion of the Trial Chamber

Krstić, (Appeals Chamber), April 19, 2004, para. 241: “These provisions [Articles 23 and 24 and Rules 100 to 106] constitute factors to be taken into consideration by the Trial Chamber when deciding a sentence on conviction. They do not constitute binding limitations on a Chamber’s discretion to impose a sentence, which must always be decided according to the facts of each particular case.”

Brulo, (Trial Chamber), December 7, 2005, para. 20: “Ultimately, . . . the sentence imposed is a matter for the discretion of the Trial Chamber after examining the particular facts of the case.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 826: “These factors [listed in Article 24 and Rule 101] are not exhaustive, but provide guidance in the effort to ensure that the punishment imposed is just and equitable.” *See also Deronjić*, (Trial Chamber), March 30, 2004, para. 152 (“Article 24 of the Statute provides a non-exhaustive list of the factors to be taken into account by the Trial Chamber in determining the sentence . . .”).

Deronjić, (Trial Chamber), March 30, 2004, para. 151: “Determination of the appropriate sentence is left to the discretion of each Trial Chamber, although guidance as to which factors should be taken into account is provided by both the Statute and the Rules.” *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 141 (same).

Stakić, (Trial Chamber), July 31, 2003, para. 884: “Neither the Statute nor the Rules of Procedure and Evidence of the Tribunal specify the penalties for offences under the Tribunal’s jurisdiction. Determination of the appropriate sentence is left to the discretion of the Trial Chamber although guidance as to which factors should be taken into account is provided by both the Statute and the Rules.”

(b) it is inappropriate to set down a definitive list of sentencing guidelines

Blaskić, (Appeals Chamber), July 29, 2004, para. 680: “The Appeals Chamber has emphasised in previous judgements that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines. The sentence must always be decided according to the facts of each particular case and the individual guilt of the perpetrator.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 1147 (same).

Krstić, (Appeals Chamber), April 19, 2004, para. 242: “The jurisprudence of the ICTY and ICTR has . . . generated a body of relevant factors to consider during sentencing. The Appeals Chamber has emphasised, however, that it is ‘inappropriate to set down a

definitive list of sentencing guidelines for future reference,' given that the imposition of a sentence is a discretionary decision."

(2) goals of sentencing

(a) generally

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 814: "The Tribunal was established to prosecute persons from a particular area, namely the former Yugoslavia, for crimes committed during a specific situation, based on international law. The punishment must therefore reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crimes, as well as respond to the call from the international community as a whole to end impunity for massive human rights violations and crimes committed during armed conflicts."

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 816: "As the Tribunal is applying international law, it must also have due regard for the impact of its application of internationally recognised norms and principles on the global level. Thus, a trial chamber must consider its obligations to the individual accused in light of its responsibility to ensure that it is upholding the purposes and principles of international criminal law. This task becomes particularly difficult in relation to punishment. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values of a particular society at a given time. This Trial Chamber must discern the underlying principles and rationales for punishment that respond to both the needs of the society of the former Yugoslavia and the international community." *See also Obrenovic*, (Trial Chamber), December 10, 2003, para. 47 (same); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 84 (similar).

Babic, (Trial Chamber), June 29, 2004, para. 68: "The Trial Chamber further accepts that the discovery of the truth is an important objective to the Tribunal. This institution was established pursuant to Security Council Resolution 827 of 1993 in order to contribute to the re-establishment of peace and security in the former Yugoslavia. The Prosecution recalled that after adopting the resolution that established the Tribunal, the Security Council observed that 'it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.' The United Nations General Assembly stressed in a resolution in 1996 'the importance and urgency of the work of the International Tribunal as an element of the process of reconciliation in Bosnia and Herzegovina and in the region.'"

Deronjic, (Trial Chamber), March 30, 2004, para. 133: "Acting under Chapter VII of the Charter of the United Nations, this Tribunal is not only mandated to search for and record, as far as possible, the truth of what happened in the former Yugoslavia, but also to bring justice to both victims and their relatives and to perpetrators. Truth and justice

should also foster a sense of reconciliation between different ethnic groups within the countries and between the new States on the territory of the former Yugoslavia.” See also *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 120 (same).

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 58-60, 82: “The United Nations Security Council established the Tribunal in Resolution 808 and adopted the Statute in Resolution 827 pursuant to the its powers under Chapter VII of the United Nations Charter, following the Security Council’s finding that the situation in the former Yugoslavia constituted a threat to international peace and security. In establishing the Tribunal, the Security Council expressed its determination to ‘put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.’ The Security Council found the establishment of the Tribunal to be a means for bringing ‘justice’ and ‘contribut[ing] to the restoration and maintenance of peace.’”

“The Tribunal was to achieve justice through criminal proceedings. The purpose of such proceedings was multi-fold: the primary objective was to convict – and punish – those individually responsible for their crimes. The suffering and loss of the victims of such crimes would thereby be internationally recognised and acknowledged. Furthermore, through criminal proceedings, the Security Council intended to send the message to all persons that any violations of international humanitarian law – and particularly the practice of ‘ethnic cleansing’ – would not be tolerated and must stop. It was further hoped that by highlighting breaches of obligations under international humanitarian law, and in particular the Geneva Conventions, that the parties to the conflict would recommit themselves to observing and adhering to those obligations, thereby preventing the commission of further crimes. Finally, it was hoped that this commitment to end impunity in the former Yugoslavia would promote respect for the rule of law globally.”

“[B]y holding *individuals* responsible for the crimes committed, it was hoped that a particular ethnic or religious group (or even political organisation) would not be held responsible for such crimes by members of other ethnic or religious groups, and that the guilt of the few would not be shifted to the innocent. Finally, through public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be determined, thereby establishing an accurate, accessible historical record. The Security Council hoped such a historical record would prevent a cycle of revenge killings and future acts of aggression.”

“[I]t was hoped that through criminal proceedings, the Tribunal would contribute to peace and reconciliation in the former Yugoslavia.” (emphasis in original)

Obrenovic, (Trial Chamber), December 10, 2003, para. 45: “In order to assess the purposes of punishment in the context of the Tribunal, the Trial Chamber finds that its assessment must begin by examining the purpose of the Tribunal, which is the prosecution of persons for crimes committed in the former Yugoslavia during a conflict situation, based on the principles of international humanitarian law. It was anticipated that through criminal proceedings, the Tribunal would contribute to peace and

reconciliation in the former Yugoslavia, and beyond, through the establishment of the truth and the promotion of the rule of law.”

Stakić, (Trial Chamber), July 31, 2003, para. 901: “The Trial Chamber recalls that the International Tribunal was set up to counteract impunity and to ensure a fair trial for the alleged perpetrators of crimes falling within its jurisdiction. The Tribunal was established under Chapter VII of the United Nations Charter on the basis of the understanding that the search for the truth is an inalienable pre-requisite for peace.”

Blaskić, (Trial Chamber), March 3, 2000, paras. 761-764: “[T]he International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.” [S]uch reasoning is not applicable only to crimes against humanity but also to war crimes and other serious violations of international humanitarian law.”

(b) deterrence and retribution are main purposes of sentencing; rehabilitation, while relevant, should not be given undue weight

Đeronjić, (Appeals Chamber), July 20, 2005, paras. 136, 137: “By reference to the *Celebići* [a/k/a *Delalić*] Appeal Judgement, the Trial Chamber correctly referred to deterrence and retribution as the main purposes of sentencing and correctly considered rehabilitation as a relevant factor that should not be given undue weight.” “The Appeals Chamber finds no cogent reasons to depart from its finding in the *Celebići* Appeal Judgement.” See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 1074, 1079; *Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 806 (similar); *Bralo*, (Trial Chamber), December 7, 2005, para. 22 (similar); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 723 and footnote 2420 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 458 (same as *Limaj*); *Đeronjić*, (Trial Chamber), March 30, 2004, paras. 142-143 (similar); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, paras. 132, 133 (same as *Đeronjić*).

Compare *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1073 (goals are deterrence; affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public to reassure them that the legal system is being implemented and enforced; retribution; public reprobation and stigmatisation by the international community; and rehabilitation). See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 678 (same).

Compare *Brđjanin*, (Trial Chamber), September 1, 2004, paras. 1090, 1092 (goals are retribution, deterrence, rehabilitation, and social defence and restoration).

Compare *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, paras. 817-818 (similar); *Mrdja*, (Trial Chamber), March 31, 2004, para. 13; *Jokić - Mladrug*, (Trial Chamber), March

18, 2004, para. 30; *Cesic*, (Trial Chamber), March 11, 2004, para. 22; *Obrenovic*, (Trial Chamber), December 10, 2003, paras. 49, 50 (same as *Blagjević*); *Galic*, (Trial Chamber), December 5, 2003, para. 757; *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 85; *Stakić*, (Trial Chamber), July 31, 2003, para. 900; *Furundžija*, (Trial Chamber), December 10, 1998, paras. 288, 291 (all stating that goals are deterrence retribution and rehabilitation).

Compare Banović, (Trial Chamber), October 28, 2003, paras. 33, 35, 76 (goals are retribution, deterrence, moral admonition and rehabilitation, with rehabilitation not to be given undue weight).

Compare Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1059; *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 739; *Simić - Milan*, (Trial Chamber), October 17, 2002, para. 33 (all stating that goals are deterrence and rehabilitation).

(c) retribution

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1075: “It is important to state that retribution should not be misunderstood as a way of expressing revenge or vengeance. Instead, retribution should be seen as

an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.”

(emphasis in original) See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 1090 (same quote); *Đeronyić*, (Trial Chamber), March 30, 2004, para. 150 (similar); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 140 (similar).

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1075: “[R]etribution has to be understood in the more modern sense of ‘just deserts,’ as expressed already in *Erdemović*:

The Trial Chamber also adopts retribution, or ‘just deserts,’ as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the guilt of the accused.”

See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 1090 (similar); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, paras. 31-32 (similar); *Babić*, (Trial Chamber), June 29, 2004, para. 44 (similar); *Brulo*, (Trial Chamber), December 7, 2005, para. 22 (similar).

Aleksoski, (Appeals Chamber), March 24, 2000, para. 185: “[Retribution] is not to be

understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.” See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1075 (similar); *Bralo*, (Trial Chamber), December 7, 2005, para. 22 (same as *Aleksovski*); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 818 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1090 (same as *Aleksovski*); *Đerović*, (Trial Chamber), March 30, 2004, para. 150 (same as *Aleksovski*); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 140 (same as *Aleksovski*); *Obrenović*, (Trial Chamber), December 10, 2003, para. 50 (similar); *Banović*, (Trial Chamber), October 18, 2003, para. 34 (same as *Aleksovski*).

Bralo, (Trial Chamber), December 7, 2005, para. 22: “[R]etribution as a purpose of punishment is here used to denote the concept that whatever sentence is imposed on a convicted person amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed, and must therefore be proportionate to his specific conduct.” See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1075 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1090 (similar); *Babić*, (Trial Chamber), June 29, 2004, para. 44 (similar); *Mrdja*, (Trial Chamber), March 31, 2004, paras. 14-15 (similar); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, paras. 31-32 (similar).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 819: “[W]ithin the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail. Recourse to the gravity of the offence, with considerations for the role of the accused in the commission of the offence and the impact of the offence on victims, should help guide a trial chamber in its determination of what sentence is necessary to reflect the indignation and condemnation of the international community for the crimes committed.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1090: “Retribution must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty must be proportionate to the wrongdoing, in other words, the punishment must fit the crime. This principle is reflected in the requirement in the Statute that the Trial Chambers, in imposing sentences, must take into account the gravity of the offence.” See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1075 (similar).

Mrdja, (Trial Chamber), March 31, 2004, paras. 14-15: “As a form of retribution, punishment expresses the society’s condemnation of the criminal act and of the person who committed it and should be proportional to the seriousness of the crimes.” (emphasis in original) See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1075 (similar); *Bralo*, (Trial Chamber), December 7, 2005, para. 22 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1090 (similar); *Babić*, (Trial

Chamber), June 29, 2004, para. 44 (same); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, paras. 31-32 (same).

Jokić - Miodrag, (Trial Chamber), March 18, 2004, paras. 31-32: “As a form of retribution, punishment expresses society’s condemnation of the criminal act and of the person who committed it The Tribunal’s punishment thus conveys the indignation of humanity for the serious violations of international humanitarian law for which an accused was found guilty. In its retributive aspect, punishment may reduce the anger and sense of injustice caused by the commission of the crime among victims and their wider community.” See also *Babić*, (Trial Chamber), June 29, 2004, para. 44 (same); *Mrdja*, (Trial Chamber), March 31, 2004, paras. 14-15 (same); *Cesic*, (Trial Judgment), March 11, 2004, para. 23 (similar).

For discussion of proportionality, see (IX)(c)(vii)(3), ICTY Digest.

(d) deterrence

(i) deterrence is both individual (also called “specific”) and general

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1076: “Both individual and general deterrence serve as important goals of sentencing.” See also *Deronjic*, (Trial Chamber), March 30, 2004, para. 144 (similar); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 134 (same as *Deronjic*).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 822: “The deterrent effect of punishment consist in discouraging the commission of similar crimes. The primary effect sought is to turn the perpetrator away from future wrongdoing (individual or specific deterrence), but it is presumed that punishment will also have the effect of discouraging others from committing the same kind of crime under statute (general deterrence).” See also *Babić*, (Trial Chamber), June 29, 2004, para. 45 (same); *Mrdja*, (Trial Chamber), March 31, 2004, para. 16 (same); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, para. 33 (same); *Cesic*, (Trial Chamber), March 11, 2004, para. 25 (similar).

(ii) individual deterrence

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 45: “The *rationale* behind individual deterrence is that the sentence should be adequate to discourage an accused from recidivism after the sentence has been served and he has been released.” (emphasis in original)

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1077: “Individual deterrence aims at the effect of a sentence upon an accused, which should be adequate to dishearten him from re-offending once he has served his sentence and has been

released.” See also *Deronjic*, (Trial Chamber), March 30, 2004, para. 145 (similar); *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 135 (same as *Deronjic*).

(iii) application—individual deterrence

Babic, (Trial Chamber), June 29, 2004, para. 45: “In the present case, the Trial Chamber considers the likelihood that [the convicted person] will commit the same kind of crime in the future to be very small, which considerably reduces the relevance of special deterrence.” See also *Mrdja*, (Trial Chamber), March 31, 2004, para. 17 (same); *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 34 (similar); *Cesic*, (Trial Chamber), March 11, 2004, para. 26 (similar).

(iv) general deterrence

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 45: “The *rationale* behind general deterrence is very similar [to the rationale behind individual deterrence:] ‘the penalties imposed by the International Tribunal must [...] have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.’” (emphasis in original) See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1078 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1091 (same); *Deronjic*, (Trial Chamber), March 30, 2004, para. 146 (similar); *Deronjic*, (Trial Chamber), March 30, 2004, para. 137 (similar); *Banovic*, (Trial Chamber), October 18, 2003, para. 34 (same).

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1078: “In the context of combating international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society.” See also *Deronjic*, (Trial Chamber), March 30, 2004, para. 147 (same); *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 137 (same, quoting *Stakic* Trial Chamber).

Babic, (Trial Chamber), June 29, 2004, para. 45: “With regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions.” See also *Mrdja*, (Trial Chamber), March 31, 2004, para. 17 (same); *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 34 (same); *Cesic*, (Trial Chamber), March 11, 2004, para. 26 (same).

Obrenovic, (Trial Chamber), December 10, 2003, para. 51: “It is hoped that the Tribunal and other international courts are bringing about the development of a culture of *respect*

for the rule of law and thereby deterring the commission of crimes.” (emphasis in original) *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 1091 (similar); *Babić*, (Trial Chamber), June 29, 2004, para. 45 (similar).

Banović, (Trial Chamber), October 18, 2003, para. 34: “[T]he principle of deterrence is a legitimate consideration in sentencing. . . . It has thus recognised the ‘general importance of deterrence as a consideration in sentencing for international crimes.’” *See also Đerović*, (Trial Chamber), March 30, 2004, para. 146 (similar).

(v) deterrence relevant to commanders

Blagojević and Jokić, (Trial Chamber), January 17, 2005, paras. 822-823: “The Appeals Chamber has expressly included commanders as persons to whom the deterrence purpose is directed. Command responsibility recognises the unique role of a superior – and particularly the duty imposed on a military commander – in promoting and ensuring compliance with the rules of international humanitarian law. In relation to Article 87 of Additional Protocol I (‘Duty of Commanders’), the provision upon which Article 7(3) of the Tribunal’s Statute is largely modelled, the Commentary on the Additional Protocols states:

We are concerned here with the very essence of the problem of enforcement of treaty rules in the field. [...] In fact, the role of commanders is decisive. Whether they are concerned with the theatre of military operations, occupied territories or places of internment, the necessary measures for the proper applications of the [Geneva] Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided. At this level, everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be effective.”

“Provisions such as Article 7(3) seek to ensure that a commander fulfils his obligation to promote compliance with the laws of war by his subordinates and punish any violations thereof, thereby curtailing any such violations, and must be given their full effect when the legal requirements are satisfied.”

For discussion of command responsibility generally, see Section (VI)(b) *et seq.*, ICTY Digest.

(vi) deterrence must not be accorded undue prominence

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 46: “The Appeals Chamber reiterates that the principle of deterrence is ‘a consideration that may legitimately be considered in sentencing’ but that, in any case, ‘this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.’ While it is undisputed that the element

plays ‘an important role in the functioning of the Tribunal,’ the Trial Chamber’s duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime. By doing so, Trial Chambers contribute to the promotion of and respect for the rule of law and respond to the call from the international community to end impunity, while ensuring that the accused are punished solely on the basis of their wrongdoings and receive a fair trial.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1078: “[T]his sentencing factor [deterrence] must not be given ‘undue prominence’ when determining a sentence.” See also *Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 801 (similar); *Aleksovski*, (Appeals Chamber), March 24, 2000, para. 185 (similar); *Tadić*, (Appeals Chamber), January 26, 2000, para. 48 (similar); *Brabić*, (Trial Chamber), December 7, 2005, para. 22 (similar); *Đerović*, (Trial Chamber), March 30, 2004, para. 145; *Obrenović*, (Trial Chamber), December 10, 2003, para. 52 (similar); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 90 (similar); *Banović*, (Trial Chamber), October 28, 2003, para. 34 (similar).

Babić, (Trial Chamber), June 29, 2004, para. 45: “[I]t would be unfair, and it would ultimately weaken respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore, in determining the appropriate sentence, the Trial Chamber does not accord undue prominence to deterrence.” See also *Mrdja*, (Trial Chamber), March 31, 2004, para. 17 (similar); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, para. 34 (same as *Mrdja*); *Česić*, (Trial Chamber), March 11, 2004, para. 26 (similar).

For discussion of deterrence in various national jurisdictions, see, e.g., *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 138.

(e) rehabilitation

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1079: “The sentencing purpose of rehabilitation aims at the reintegration of the offender into society.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 824: “The Trial Chamber finds that in sentencing an accused it must strive to attain a third goal: rehabilitation. Particularly in cases where the crime was committed on a discriminatory basis, like this case, this process of reflection – and hearing the victims testify – can inspire tolerance and understanding of ‘the other,’ thereby reducing the risk of recidivism. Reconciliation and peace would thereby be promoted.” See also *Obrenović*, (Trial Chamber), December 10, 2003, para. 53 (similar); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 93 (similar).

Babić, (Trial Chamber), June 29, 2004, para. 46: “Punishment is also understood as having a rehabilitative purpose. The loss of freedom, which is the form of punishment

imposed by the Tribunal, provides the context for the convicted person's reflection on the wrongfulness of his acts and may give rise to an awareness of the harm and suffering these acts have caused to others. This process contributes to the reintegration of the convicted person into society." See also *Mrdija*, (Trial Chamber), March 31, 2004, para. 18 (similar); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, para. 35 (similar).

(i) rehabilitation will not be given undue prominence

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1079: "The Appeals Chamber recalls its finding in *Celebić* [a/k/a *Delalić*] that

although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal.

In the light of the gravity of many of the crimes under the International Tribunal's jurisdiction, the weight of rehabilitative considerations may be limited in some cases. This is consistent with the International Tribunal's settled jurisprudence that the gravity of the crime is the most important factor in determining the sentence. It would violate the principle of proportionality and endanger the pursuit of other sentencing purposes if rehabilitative considerations were given undue prominence in the sentencing process." (emphasis in original)

Bralo, (Trial Chamber), December 7, 2005, para. 22: "Rehabilitation of the individual offender is also considered as a legitimate purpose of punishment, albeit one that should not be given 'undue weight.'" See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 824 (similar).

(f) guilty plea, *inter alia*, seen as rehabilitation, furthers truth, contributes to reconciliation and avoids revisionism

See discussion of guilty pleas as a mitigating factor, under "guilty plea," Section (IX)(c)(iv)(3)(c), ICTY Digest.

(g) equality before the law

Đeronjić, (Trial Chamber), March 30, 2004, para. 137: "In *Stakić*, this Trial Chamber recalled that . . . "one goal of sentencing is the implementation of the principle of equality before the law" See also *Stakić*, (Trial Chamber), July 31, 2003, para. 901 (same language as quoted).

Đeronjić, (Trial Chamber), March 30, 2004, para. 137: "In *Stakić*, this Trial Chamber recalled that:

[T]he International Tribunal was set up to counteract impunity and to ensure a fair trial for the alleged perpetrators of crimes falling within its jurisdiction. [...] The Tribunal is mandated to determine the appropriate penalty, often in respect of persons who would never have expected to stand trial. While one goal of sentencing is the implementation of the principle of equality before the law, another is to prevent persons who find themselves in similar situations in the future from committing crimes.”

See also Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 124 (same); *Stakic*, (Trial Chamber), July 31, 2003, para. 901 (same).

(h) restoring and maintaining peace

Bralo, (Trial Chamber), December 7, 2005, para. 21: “As a preliminary matter, the Trial Chamber draws attention to the purposes of punishment in the context of the Tribunal. The Tribunal was established to prosecute individuals who committed serious violations of international humanitarian law in the course of conflicts in the states of the former Yugoslavia, as a measure to contribute to the restoration and maintenance of peace in that region. That aim must be borne in mind by a Trial Chamber in the sentencing process.”

Babic, (Trial Chamber), June 29, 2004, para. 68: “This institution was established pursuant to Security Council Resolution 827 of 1993 in order to contribute to the re-establishment of peace and security in the former Yugoslavia.” *See also Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 58 (similar).

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 4: “It is now for this Trial Chamber to balance the extreme gravity of the crimes for which the Accused accepted full responsibility against this contribution to peace and security. In doing so, it is for this Trial Chamber to come as close as possible to justice for both victims and their relatives and the Accused, justice being of paramount importance for the restoration and maintenance of peace.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 60: “The Tribunal was further to contribute to the restoration and maintenance of peace through criminal proceedings. The immediate consequence of such proceedings was the removal of those persons most responsible for the commission of crimes in the course of – and even in furtherance of – the armed conflict.”

(i) reinforcing that the laws must be obeyed by everyone and that the international legal system is implemented and enforced

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1080: “One of the

most important purposes of a sentence imposed by the International Tribunal is to make it abundantly clear that the international legal system is implemented and enforced. This sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1082: “The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law. The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause.’ Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal’s jurisdiction.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 1091: “One of the main purposes of a sentence imposed by an international criminal tribunal is to ‘influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.” See also *Đerunjić*, (Trial Chamber), March 30, 2004, para. 149 (same); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 139 (same).

(j) ending impunity

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1081: “The reprobation or stigmatisation associated with a sentence is closely related to the purpose of affirmative prevention. Similarly, putting an end to impunity for the commission of serious violations of international humanitarian law refers to affirmative prevention. As the Trial Chamber held in *Kupreskić et al.*,

another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international justice.

Thus, both stigmatising the offender’s conduct and ending impunity serve the same goal pursued by affirmative general prevention: to reassure the public that the legal system

has been upheld and to influence the public not to violate this legal system.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 88-89: “At the time that the crimes in this case were committed . . . expectations of impunity for ones crimes, no matter how egregious, were the norm. A stark example of this expectation of impunity and total disregard for the law in 1995 was provided by Momir Nikolic himself when he was asked during his cross-examination in the *Blagojevic* Trial whether he was required to abide by the Geneva Conventions in carrying out his duties in and around Srebrenica in July 1995. Momir Nikolic replied with a mix of incredulity and exasperation:

Do you really think that in an operation where 7,000 people were set aside, captured, and killed that somebody was adhering to the Geneva Conventions? Do you really believe that somebody adhered to the law, rules and regulations in an operation where so many were killed? First of all, they were captured, killed, and then buried, exhumed once again, buried again. Can you conceive of that, that somebody in an operation of that kind adhered to the Geneva Conventions? Nobody [...] adhered to the Geneva Conventions or the rules and regulations. Because had they, then the consequences of that particular operation would not have been a total of 7,000 people dead.

During the past ten years, as international criminal law has moved from ‘law in theory’ to ‘law in practice,’ the principles of international humanitarian law have taken hold to the extent that in the face of such widespread and massive crimes a person being called to participate in the criminal enterprise *might* consider the Geneva Conventions and the consequences of disregarding the principles contained therein.”

“During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of *respect* for the rule of law and not simply the *fear* of the consequences of breaking the law, and thereby deterring the commission of crimes.” (emphasis in original)

For discussion of the goals of penalties under the law of the Federal Republic of Yugoslavia, see, e.g., *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, paras. 820-821; *Obrenovic*, (Trial Chamber), December 10, 2003, para. 48; *Nikolic - Momir*, (Trial Chamber), December 2, 2003, paras. 91, 92.

iii) gravity

(1) sentence to reflect gravity of the crime

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1061: “Article 24(2) of the Statute requires a Trial Chamber to take into account, *inter alia*, the gravity of the crime when determining the sentence. See also *Blaskic*, (Appeals Chamber), July 29, 2004, para. 683 (similar); *Jelacic*, (Appeals Chamber), July 5, 2001, para. 94 (similar); *Deronjic*, (Trial Chamber), March 30, 2004, para. 184 (similar).

See also *Aleksovski*, (Appeals Chamber), March 24, 2000, para. 182: “Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence.” See also *Jelisić*, (Appeals Chamber), July 5, 2001, para. 94 (quoting same); *Banović*, (Trial Chamber), October 28, 2003, para. 36 (quoting same).

(a) gravity is “the litmus test” and the primary concern in imposing the sentence

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 18: “As correctly noted by the Trial Chamber . . . the gravity of the offence may be regarded as ‘the litmus test’ in the imposition of an appropriate sentence.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 683 (similar); *Aleksovski*, (Appeals Chamber), March 24, 2000, para. 182 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 832 (similar); *Deronjić*, (Trial Chamber), March 30, 2004, para. 154 (similar); *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 144 (same as *Deronjić*); *Obrenović*, (Trial Chamber), December 10, 2003, para. 62 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 102 (similar).

Delalić et al., (Appeals Chamber), February 20, 2001, para. 731: “[T]he gravity of the offence is the primary consideration in imposing [the] sentence.” See also *Bralo*, (Trial Chamber), December 7, 2005, para. 24 (gravity is “[t]he most important factor to be taken into account” in determining the sentence); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 724 (gravity “is a factor of paramount importance in the determination of sentence”); *Strugar*, (Trial Chamber), January 31, 2005, para. 459 (same as *Limaj*); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1093 (gravity “should be the principal guideline for sentencing”); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1094 (gravity is “the primary consideration in imposing sentence”); *Babić*, (Trial Chamber), June 29, 2004, para. 47 (similar to *Delalić*); *Mrdija*, (Trial Chamber), March 31, 2004, para. 20 (gravity “is the most important consideration when determining the appropriate sentence”); *Deronjić*, (Trial Chamber), March 30, 2004, para. 184 (“gravity of the crime is of primary importance in determining the sentence”); *Cesic*, (Trial Chamber), March 11, 2004, para. 31 (gravity is “[t]he main feature in sentencing” and the “primary consideration”); *Banović*, (Trial Chamber), October 28, 2003, para. 36 (gravity is the “overriding obligation in sentencing,” the “primary consideration” and the ‘cardinal feature’ in sentencing”); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 718 (gravity is “a factor of primary importance”).

(b) determination of gravity requires consideration of the particular circumstances of the case, as well as the form and degree of the accused’s participation

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1061: The Appeals Chamber agrees with the finding in *Kupreskić et al.* that

[. . .] The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.”

See also Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 18 (similar); *Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 156 (quoting *Kupreskić*; *Delalić et al.*, (Appeals Chamber), February 20, 2001, para. 731 (quoting *Kupreskić*); *Furundžija*, (Appeals Chamber), July 21, 2000, para. 249 (similar); *Aleksovski*, (Appeals Chamber), March 24, 2000, para. 182 (similar); *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 831 (similar); *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1094 (quoting *Kupreskić*); *Mrdja*, (Trial Chamber), March 31, 2004, para. 20 (quoting *Kupreskić*); *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 41 (similar); *Obrenović*, (Trial Chamber), December 10, 2003, para. 61 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 101 (similar); *Banović*, (Trial Chamber), October 28, 2003, para. 37 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, paras. 1062-1063 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 683: “The Appeals Chamber has ruled that sentences to be imposed must reflect the inherent gravity or totality of the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 724 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 459 (same as *Limaj*); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 718 (similar).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 832: “[T]he Appeals Chamber has stressed that the sentence should be individualised and that the particular circumstances of the case are therefore of primary importance.”

Banović, (Trial Chamber), October 28, 2003, para. 36: “[T]he overriding obligation in determining sentence is that of fitting the penalty to the gravity of the criminal conduct.”

Stakić, (Trial Chamber), July 31, 2003, para. 903: “The sentence must reflect the gravity of the criminal conduct of the accused. This requires consideration of the underlying crimes as well as the form and degree of the participation of the individual accused.”

Compare Galic, (Trial Chamber), December 5, 2003, para. 758: “The Tribunal has often reiterated in its Judgements that the primary factor to be taken into account in imposing a sentence is the gravity of the offence, including the impact of the crimes on the victims. This is true irrespective of the form of criminal participation of the individual.”

(2) gravity of particular crimes

(a) gravity of genocide

Krstić, (Appeals Chamber), April 19, 2004, paras. 36, 275: “Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.” “The crime of genocide, in particular, is universally viewed as an especially grievous and reprehensible violation.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 834: “All crimes falling within the jurisdiction of this Tribunal are characterised as ‘serious violations of international humanitarian law.’ . . . While not seeking to minimise the gravity of any other crimes, the Trial Chamber finds that two of the crimes for which the Accused have been convicted warrant special attention due to their targeting of groups because on discriminatory grounds: genocide and persecutions as a crimes against humanity.”

Stakić, (Trial Chamber), July 31, 2003, para. 502: “The Trial Chamber recalls and adopts the description of genocide as ‘the crime of crimes,’ set down by the Rwanda Tribunal in the *Kambanda* case and more recently by Judge Wald in her Partial Dissenting Opinion in the *Jelić* Appeal Judgement where she stated:

Some learned commentators on genocide stress that the currency of this ‘crime of all crimes’ should not be diminished by use in other than large scale state-sponsored campaigns to destroy . . . groups, even if the detailed definition of genocide in our Statute would allow broader coverage.

. . . [T]he Trial Chamber will, whilst interpreting Article 4 restrictively and with caution, always be guided by the unique nature of the crime of genocide.”

Krstić, (Trial Chamber), August 2, 2001, para. 700: “It can . . . be argued . . . [that] genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy. However, this does not rule out the Trial Chamber’s duty to decide on the appropriate punishment according to the facts of each case.”

Compare Blaskić, (Trial Chamber), March 3, 2000, paras. 800-802: “The ICTR has . . . supposedly established a genuine hierarchy of crimes” with genocide being the “crime of crimes,” but “[t]he ICTY has not yet transposed this hierarchy of crimes to the sentencing phase. [I]t appears that the case-law of the [ICTY] is not fixed.”

(b) gravity of crimes against humanity

Obrenovic, (Trial Chamber), December 10, 2003, para. 65: “The Trial Chamber . . . recalls the finding of the Appeals Chamber in relation to crimes against humanity generally, [b]ecause of their heinousness and magnitude [crimes against humanity] constitute egregious attacks on human dignity, on the very notion of humanness. They consequently affect, or should affect, each and every member of [human]kind, whatever his or her nationality, ethnic group and location.”

See also Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 105 (same).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 1063: “Crimes against humanity are inherently very serious crimes.”

(i) gravity of persecution as a crime against humanity

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 834: “[T]he Trial Chamber finds that two of the crimes for which the Accused have been convicted warrant special attention due to their targeting of groups because on discriminatory grounds: genocide and persecutions as a crimes against humanity.” “The crime of persecutions is . . . particularly grave because it incorporates manifold acts committed with discriminatory intent.”

Bralo, (Trial Chamber), December 7, 2005, para. 28: “The Trial Chamber notes . . . that the crimes of which Bralo has been convicted are of the utmost gravity. Count 1 of the Indictment is a charge of persecution as a crime against humanity, an extremely serious offence involving a deliberate intention to discriminate against a particular group of people in the context of a widespread or systematic attack on a civilian population.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 1095 (similar).

Obrenovic, (Trial Chamber), December 10, 2003, para. 65: “The Trial Chamber considers that the seriousness of the crime of persecutions cannot be emphasised enough: this is a crime that can be committed in different manners and incorporates manifold acts. It is the abhorrent discriminatory intent behind the commission of this crime against humanity that renders it particularly grave.” *See also Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 105 (same).

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 105: “The Trial Chamber . . . recalls the finding of the Appeals Chamber in relation to crimes against humanity generally,

Because of their heinousness and magnitude ‘crimes against humanity’ constitute egregious attacks on human dignity, on the very notion of humanness. They consequently affect, or should affect, each and every member of [human]kind, whatever his or her nationality, ethnic group and location.”

See also *Babic*, (Trial Chamber), June 29, 2004, para. 50 (“The commission of [persecution] would have attracted the harshest sentence in the former Yugoslavia.”); *Banovic*, (Trial Chamber), October 28, 2003, para. 41 (“the crime of persecution is ‘inherently a very serious crime’”); *Banovic*, (Trial Chamber), October 28, 2003, para. 91 (persecution as a crime against humanity “justifies] a more severe penalty” “on account of its distinctive features”); *Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 1063 (“acts found to constitute persecution are acts of the utmost gravity”).

(ii) application—gravity of persecution as a crime against humanity

Babic, (Trial Chamber), June 29, 2004, para. 53: “[T]he Trial Chamber is persuaded of the extreme gravity of the crime to which *Babic* pleaded guilty. The crime of persecution [committed throughout the so-called Serbian Autonomous District of Krajina] extended over a relatively limited period of time and a large geographical area, and involved the murder of more than 200 civilians, including women and elderly persons, the confinement and imprisonment of several hundred civilians in inhumane conditions, the forcible transfer or deportation of thousands of civilians, and the destruction of homes and public or private property. The crime, which was characterized by ruthlessness and savagery and was committed with the intent to discriminate against non-Serb civilians, strongly impacted on victims and their relatives. Their suffering is still significant. Participants in crimes of this gravity should expect sentences of commensurate severity.”

Banovic, (Trial Chamber), October 28, 2003, paras. 41-42: “In this case, the Accused has admitted his participation in the following persecutory acts:

- (a) the murder of five prisoners;
- (b) the beating of twenty-seven detainees; and
- (c) the confinement in inhumane conditions, harassment, humiliation and psychological abuse of Bosnian Muslims, Bosnia Croats and other non-Serbs detained at the Keraterm camp [in Prijedor].”

“The Trial Chamber accepts that these acts considered either separately or in combination, and examined in their context, are of the utmost gravity. The parties have agreed, and the Trial Chamber is satisfied, that the imprisonment and confinement of non-Serbs in inhumane conditions at the Keraterm camp was carried out with the intent to discriminate against non-Serb detainees. During detention, the prisoners were forced to endure the most brutal and inadequate living conditions. The prisoners were regularly beaten and mistreated by the Keraterm camp guards as well as ‘visitors.’”

Stakic, (Trial Chamber), July 31, 2003, para. 907: “The Trial Chamber regards the acts of persecutions and extermination as the heart of the criminal conduct of Dr. Stakic. Persecutions constitutes inherently a very grave crime because of its distinctive feature of discriminatory intent. All the constitutive acts of the persecutorial campaign are serious

in themselves and the Trial Chamber has taken into account their scale and cumulative effect within the Municipality of Prijedor where, more than 1,500 people were killed and tens of thousands deported.”

**(iii) gravity of murder as a crime against humanity:
intent to kill more serious than intent to cause
serious bodily harm**

Cesic, (Trial Chamber), March 11, 2004, para. 34: “A murder committed with intent to kill is ordinarily regarded as more serious than a murder committed with intent to cause serious bodily harm which the perpetrator should reasonably have known might cause death. Ranko Cesic admitted that he committed the murders of which he is convicted with the intent to kill. This is an inherently grave offence and heavy penalties are provided for and imposed in all national legal systems when murder, committed with intent to kill, is concerned.”

For discussion of murder as a crime against humanity, see Section (IV)(d)(i), ICTY Digest.

**(c) no distinction between the gravity of a crime against
humanity and a war crime**

Furundzija, (Appeals Chamber), July 21, 2000, para. 247: “[T]here is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter. It follows that the length of sentences imposed for crimes against humanity does not necessarily limit the length of sentences imposed for war crimes.”

Tadic, (Appeals Chamber), January 26, 2000, para. 69: “[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law, the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1095: “In assessing the gravity of the crimes, the Trial Chamber . . . takes into account the fact that it is an established principle in the jurisprudence of the Tribunal that war crimes are not inherently less serious than crimes against humanity.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 459 (similar); *Mrdja*, (Trial Chamber), March 31, 2004, para. 24 (similar); *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 43 (similar); *Cesic*, (Trial Chamber), March 11, 2004, para. 32 (similar).

Stakić, (Trial Chamber), July 31, 2003, para. 929: “The argument that, all else being equal, crimes against humanity should attract a greater penalty than war crimes has been rejected by the Chambers of the Tribunal which have reaffirmed that the most important factor is the gravity of the crime rather than its objective classification.”

But see Erdemović, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 20: “[A] punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime.” “It is in their very nature that crimes against humanity differ in principle from war crimes. Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator’s conduct not only towards the immediate victim but also towards the whole of humankind.”

(d) gravity of war crimes

Blaskić, (Appeals Chamber), July 29, 2004, para. 684: “In this case, the Appellant has been found guilty of particular instances of ordering what amounted to cruel and inhuman treatment of persons who were not participating in the hostilities, and of failing to punish such conduct on the part of others. The crimes of which the Appellant has been convicted are serious violations of international humanitarian law, directed almost exclusively against Bosnian Muslims. Their arbitrary detention in pitiful conditions, and in a climate of fear, combined with their employment for forced labour or as human shields, establishes the gravity of the offences in this case. In particular the abuse of the sizeable number of 247 human beings as human shields and – in doing so – endangering their lives at least *in abstracto* has to be seen as a serious aggravating factor.”⁶²

Bralo, (Trial Chamber), December 7, 2005, para. 28: “[T]he remaining counts of the Indictment are a catalogue of serious, violent offences, namely murder, rape, torture, unlawful confinement, and inhuman treatment, constituting grave breaches of the Geneva Conventions and/or violations of the laws or customs of war. Bralo has explicitly acknowledged his personal culpability for these crimes, in addition to recognising their gravity.”

Brdjanin, (Trial Chamber), September 1, 2004, para. 1095: “The Trial Chamber is . . . satisfied of the seriousness of the crimes of wilful killing and torture, wanton destruction of cities, towns and villages or devastation not justified by military necessity and destruction or wilful damage done to institutions dedicated to religion.”

⁶² The Appeals Chamber made these evaluations under the heading “the gravity of the offence,” although referring to an aggravating factor.

Jokić - Miodrag, (Trial Chamber), March 18, 2004, para. 113: “Miodrag Jokić is convicted of six war crimes, all of which have been found to be extremely serious in terms of the protected interests violated: life and integrity of the victims; protection of civilian objects; protection of cultural property.”

For discussion of the gravity of the crime of unlawful attacks on civilians and devastation not justified by military necessity, see *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, paras. 44–45. See also *Strugar*, (Trial Chamber), January 31, 2005, para. 461 (discussing the gravity of attacks on civilians).

For discussion of the gravity of the crime of destruction or willful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science, see *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, paras. 46, 53. See also *Strugar*, (Trial Chamber), January 31, 2005, para. 461 (discussing the gravity of destruction of, and willful damage to, cultural property).

(e) whether there is a rule that crimes resulting in loss of life should be punished more severely than those not leading to loss of life

Furundžija, (Appeals Chamber), July 21, 2000, para. 246: The Appeals Chamber considers “the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life” “to be too rigid and mechanistic.”

Compare Delalić et al., (Appeals Chamber), February 20, 2001, para. 732: Regarding command responsibility, “[a] failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.”

(f) gravity of offenses committed under Article 7(1)

(i) gravity of participant in a joint criminal enterprise compared to principal offender

Krnjelac, (Trial Chamber), March 15, 2002, para. 77: “This Trial Chamber does not hold the same view as Trial Chamber I [*Krstić and Kvočka et al.*] as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater sentence than the many functionaries who between them carry out the actual killing.”

**(ii) aiding and abetting warrants lower sentence
than co-perpetration of a joint criminal
enterprise**

Krstić, (Appeals Chamber), April 19, 2004, para. 268: “Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasiljević* case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognized in the ICTR and in many national jurisdictions. While Radislav Krstić’s crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Krstić’s responsibility for the murders as a violation of laws or customs of war committed between 13 and 19 July 1995 in Srebrenica. As such, the revision of Krstić’s conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.”

Vasiljević, (Appeals Chamber), February 25, 2004, paras. 181, 182: “[T]he Appeals Chamber is of the view that the sentence needs to be adjusted due to the Appeals Chamber’s finding that the Appellant was responsible as an aider and abettor with respect to murder as a violation of the laws or customs of war under Article 3 of the Statute . . . and persecution by way of murder and inhumane acts as a crime against humanity pursuant to Article 5(h) of the Statute . . . , instead of being responsible as a co-perpetrator as was found by the Trial Chamber.” “The Appeals Chamber is of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.” *But see Vasiljević*, (Appeals Chamber), February 25, 2004, Separate and Dissenting Opinion of Judge Shahabuddeen (Vasiljević should be responsible as a co-perpetrator and not as an aider and abettor).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 73: “[T]he seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender’”

(g) gravity of offenses committed under Article 7(3)

Delalić et al., (Appeals Chamber), February 20, 2001, para. 732: “The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute: (1) the gravity of the underlying crime committed by the convicted person’s subordinate; and (2) the gravity of the convicted person’s own conduct in failing to prevent or punish the underlying crimes. The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior’s conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a

subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.”

See also Strugar, (Trial Chamber), January 31, 2005, paras. 462-463: “[O]f relevance to the gravity of the offence is the form of the Accused’s participation in the commission of the crimes”—suggesting that responsibility under Article 7(3) may be less grave than responsibility under Article 7(1).)

(h) whether categorizing the seriousness of crimes is helpful

Cesic, (Trial Chamber), March 11, 2004, para. 32: “[T]he seriousness of crimes within each category is not exclusively measured by their characterization within that category. Rather, the Tribunal’s case law has consistently asserted that gravity should be assessed in view of the particular circumstances of each individual case.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 77: “This Trial Chamber does not hold the same view as Trial Chamber I [*Krstic and Kovack et al.*] as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing.”

(3) factors for assessing gravity of offenses

(a) generally

Blaskic, (Appeals Chamber), July 29, 2004, para. 683: “Factors to be considered [in assessing gravity] include the discriminatory nature of the crimes where this is not considered as an element of a conviction, and the vulnerability of the victims. The consequences of the crime upon the victim directly injured is always relevant to sentencing, that is, ‘the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.’ Furthermore, the effects of the crime on relatives of the immediate victims may be considered as relevant to the culpability of the offender and in determining a sentence.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 833: “By ‘gravity of the offence’ the Trial Chamber understands that it must consider the crimes for which each Accused has been convicted, the underlying criminal conduct generally, and the specific role played by [each accused] in the commission of the crime. Additionally, the Trial Chamber will take into account the impact of the crimes on the victims.” *See also Obrenovic*, (Trial Chamber), December 10, 2003, para. 50 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 103 (similar).

Babic (Trial Chamber), June 29, 2004, para. 47: “To achieve the objectives of sentencing in determining the length of the sentence, the Trial Chamber will give primary consideration to the gravity of the crime, which is to be assessed by taking into account, in particular, the number of victims and the suffering inflicted upon them.” *See also Cesic*,

(Trial Chamber), March 11, 2004, para. 32 (“The number of victims and the suffering of the victims are among those particular circumstances to be considered in a given case”); *Galić*, (Trial Chamber), December 5, 2003, para. 758: “the number of victims, the effect of the crimes on the broader targeted group, and the suffering inflicted on the victims” will be assessed).

Mrdja, (Trial Chamber), March 31, 2004, para. 21: “In determining the gravity of the crimes, the Trial Chamber will give consideration to the legal nature of the offences committed, their scale, the role [the accused] played in their commission, and the impact upon the victims and their families.” See also *Mrdja*, (Trial Chamber), March 31, 2004, para. 123 (similar).

Deronjic, (Trial Chamber), March 30, 2004, para. 154: “It is necessary to consider the nature of the crime and ‘the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime’ in order to determine the gravity of the crime.” See also *Cesic*, (Trial Chamber), March 11, 2004, para. 32 (same quoted language); *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 144 (same).

Kvočka et al., (Trial Chamber), November 2, 2001, para. 702: “[T]he following should be taken into consideration: . . . the repetitious and continuing nature of most of the crimes, . . . the very real fears of witnesses that they would be next, . . . the sexual violence inflicted upon the women, and the discriminatory nature of the crimes. All are relevant factors in assessing the gravity of the crimes.”

**(b) same fact should not be evaluated both regarding gravity
and as an aggravating factor—double-counting is
impermissible**

Deronjic, (Appeals Chamber), July 20, 2005, paras. 106-107: “The Appeals Chamber considers that factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*.” “The Trial Chamber was cognisant of the fact that double-counting for sentencing purposes is impermissible.”

Compare Kunarac, Kovac, and Vokotic, (Appeals Chamber), June 12, 2002, para. 352: “Whether or not the vulnerability of the victim is an element of the crime of rape does not affect its being evidence of the gravity of the crime, which can duly be considered in the course of sentencing.”

(i) application—double-counting

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 30: “[A]lthough the Trial Chamber listed [Jokic’s] position of authority as an aggravating factor, it did not simultaneously suggest, in its discussion of the gravity of the crimes, that the crimes in

question should be considered especially grave because the Appellant was convicted under the head of command responsibility and not just as an aider and abettor. Thus, in practice, the Trial Chamber appears to have only considered the effect of the Appellant's position of authority on the sentence once, rather than impermissibly double-counting it."

Limaj et al., (Trial Chamber), November 30, 2005, para. 731: "The recurrence of Haradin Bala's criminal behaviour should not be considered an aggravating factor in the present case as the number of crimes committed in the period of time concerned has been taken into account in evaluating the gravity of the offences. The same can be said with regard to the direct participation of the Accused to the crimes and other factors invoked (*i.e.* vulnerability of the victims as detainees, violent and humiliating nature of the acts, circumstances of the offences generally)."

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1100-1101: "The Prosecution submits that the crimes committed in the ARK [Autonomous Region of Krajina] during 1992 were of the gravest nature both in terms of their numbers and in the extent of harm and suffering of the victims." "The Trial Chamber finds that given the nature of the crimes of which the Accused has been found guilty, the scale and scope of these crimes are essentially subsumed in the overall gravity of those crimes and have already been taken into consideration in making that assessment. Accordingly, the Trial Chamber will not treat them as aggravating factors separately."

Jokić - Miodrag, (Trial Chamber), March 18, 2004, para. 67: "The Trial Chamber deems that the crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science subsumes the fact that the Old Town was an undefended and culturally valuable site, thus especially protected under international law. It therefore finds that this special status of the Old Town has already been taken into consideration in the definition and evaluation of the gravity of the crime and should not be considered also in aggravation."

Cesic, (Trial Chamber), March 11, 2004, para. 48: "The recurrence of Ranko Cesic's criminal behaviour, which cannot be contested, is nevertheless not considered an aggravating factor in the present case as the number of crimes committed is taken into account in evaluating the gravity of the crimes."

Obrénović, (Trial Chamber), December 10, 2003, para. 101: "The Trial Chamber finds that the depravity of the crimes is subsumed in the overall gravity of the offence, and has already been addressed above. Therefore, the Trial Chamber does not consider this separately as an aggravating factor." *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 136 (similar).

Banović, (Trial Chamber), October 28, 2003, para. 53: The Trial Chamber refused to consider circumstances related to the offence as aggravating factors where “in the view of the Trial Chamber, these matters have already been taken into account when assessing the gravity of the offence.”

(c) overlap in criteria for evaluating gravity and aggravating factors/ whether they may be evaluated simultaneously

Đeronjić, (Appeals Chamber), July 20, 2005, para. 107: “[T]he Trial Chamber did not address the distinction between the gravity of the offence and the aggravating circumstances, and did not expressly state in its Sentencing Judgement the principle that a factor may only be taken into account once in sentencing. The Appeals Chamber notes that, as correctly pointed out by the Appellant, section IX. A. of the Sentencing Judgement, titled ‘Gravity of the Offence and Aggravating Circumstances,’ addresses the gravity of the offence together with the factors considered in aggravation. This is unfortunate, but it does not necessarily follow that the Trial Chamber engaged in impermissible double-counting”⁶³

Vasiljević, (Appeals Chamber), February 25, 2004, para. 157: “The Appeals Chamber notes that the method and circumstances surrounding a killing are factors which normally would be taken into account in a Trial Chamber’s consideration of the ‘inherent gravity’ of the offence. In the present case, it was considered as an aggravating factor. The Appeals Chamber holds that the Trial Chamber did not err in doing so.”

Bralo, (Trial Chamber), December 7, 2005, para. 27: “The aggravating circumstances identified by the Prosecution [the large number of victims, the youth of the victims, and the exacerbated humiliation and degradation suffered] are all factors which may add to the gravity of the offences. Seeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise. Therefore, the Trial Chamber here examines the crimes of which Bralo has been convicted to assess their inherent gravity, along with any circumstances that serve to make the gravity of Bralo’s criminal conduct worse. By taking this approach, the Trial Chamber also avoids any possible double-counting of particular factors, which would be impermissible.”

See also Blaskić, (Appeals Chamber), July 29, 2004, para. 684 (evaluating the seriousness of war crimes and the number of victims under the heading “the gravity of the offence,” but referring to the number of victims as a “serious aggravating factor”); *Stinugar*, (Trial Chamber), January 31, 2005, paras. 461, 462 (evaluating the gravity of certain crimes and

⁶³ Most cases evaluate gravity and aggravating circumstances separately, although there is overlap of the criteria used for evaluating gravity and aggravating circumstances.

the gravity of the accused's role in the crimes, but not evaluating aggravating circumstances).

(d) the scale of the crimes and number of victims

Babić (Trial Chamber), June 29, 2004, para. 47: In assessing gravity, “primary consideration” is to be given to “the number of victims” *See also Česić*, (Trial Chamber), March 11, 2004, para. 32 (the number of victims is among the “particular circumstances to be considered”); *Krstić*, (Trial Chamber), August 2, 2001, para. 702 (similar).

Mrđija, (Trial Chamber), March 31, 2004, para. 21: “In determining the gravity of the crimes, the Trial Chamber will give consideration to [among other things] . . . their scale.” *See also Mrđija*, (Trial Chamber), March 31, 2004, para. 123 (similar).

Plavšić, (Trial Chamber), February 27, 2003, para. 52: “The gravity [of offences] is illustrated by: the massive scope and extent of the persecutions; the numbers killed, deported and forcibly expelled; the grossly inhumane treatment of detainees; and the scope of the wanton destruction of property and religious buildings.”

(i) application—the scale of the crimes and number of victims

Blaskić, (Appeals Chamber), July 29, 2004, para. 684: “In this case, the Appellant has been found guilty of particular instances of ordering what amounted to cruel and inhuman treatment of persons who were not participating in the hostilities, and of failing to punish such conduct on the part of others. The crimes of which the Appellant has been convicted [between May 1992 and January 1994, particularly in the Lasva Valley region of Central Bosnia and in the municipality of Vitez in particular] are serious violations of international humanitarian law, directed almost exclusively against Bosnian Muslims. Their arbitrary detention in pitiful conditions, and in a climate of fear, combined with their employment for forced labour or as human shields, establishes the gravity of the offences in this case. In particular the abuse of the sizeable number of 247 human beings as human shields and – in doing so – endangering their lives at least *in abstracto* has to be seen as a serious aggravating factor.”⁶⁴

Bralo, (Trial Chamber), December 7, 2005, para. 30: “There can . . . be little doubt that Bralo was a willing participant in one of the most brutal attacks upon a community in the entire conflict in Bosnia and Herzegovina. As a consequence of this attack, the Muslim community of Ahmici was decimated and those who survived the killing were

⁶⁴ The Appeals Chamber made these evaluations under the heading “the gravity of the offence,” although referring to aggravating factors.

driven from their homes, which were razed or burned. According to the report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, all of the approximately 180 Muslim homes in Ahmici were destroyed and all of the surviving Muslim residents fled or were forced to leave. A clearer example of 'ethnic cleansing' would be difficult to find. The scale of the attack and the number of victims who were persecuted by Bralo in its course serve to further aggravate the seriousness of his criminal conduct, which is a factor taken into account by the Trial Chamber in its determination of sentence.⁴⁶

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 837: In examining the issue of gravity, the Trial Chamber stated: "The campaign of persecutions in the present case was enormous in scale and encompassed a criminal enterprise to murder over 7,000 Bosnian Muslim men and forcibly transfer more than 25,000 Bosnian Muslims."

Obrenovic, (Trial Chamber), December 10, 2003, para. 77: "The Trial Chamber, in making its determination regarding the gravity and nature of the offence, has reviewed the evidence presented before it. The Trial Chamber has considered the purpose of the joint criminal enterprise in which Dragan Obrenovic was a participant. The crimes committed following the fall of Srebrenica were of an enormous magnitude and scale, and the gravity of these crimes is unquestionable. Over 7,000 men were separated from their families, murdered and buried in mass graves. The manner in which the executions were carried out, as described . . . was both methodical and chilling in its 'efficiency' and display of utter inhumanity. Over eight years later, the impact of the crimes committed after the fall of Srebrenica continue to be felt upon the women, children and men who survived the horrific events." *See also Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 121 (similar).

Galic, (Trial Chamber), December 5, 2003, para. 764: "The gravity of the offences committed by General Galic is established by their scale, pattern and virtually continuous repetition, almost daily, over many months. Inhabitants of Sarajevo – men, women, children and elderly persons – were terrorized and hundreds of civilians were killed and thousands wounded during daily activities such as attending funerals, tending vegetable plots, fetching water, shopping, going to hospital, commuting within the city, or while at home. The Majority of the Trial Chamber also takes into consideration the physical and psychological suffering inflicted on the victims. Sarajevo was not a city where occasional random acts of violence against civilians occurred or where living conditions were simply hard. This was an anguishing environment in which, at a

⁴⁶ This decision evaluates gravity and aggravating circumstances together, stating: "The aggravating circumstances identified by the Prosecutor are all factors which may add to the gravity of the offences. Seeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise. . . ." *Bralo*, (Trial Chamber), December 7, 2005, para. 27.

minimum hundreds of men, women, children, and elderly people were killed, and thousands were wounded and more generally terrorized.”

Stakic, (Trial Chamber), July 31, 2003, para. 910: “The gravity of the crimes committed by Dr. Stakic is reflected in the tragic extent of the harm and suffering caused to the victims of the criminal campaign. The factors to be considered are the number of victims, the physical and mental trauma suffered by the survivors, and the social and economic consequences of the campaign for the targeted non-Serb group that comprised citizens of the Municipality of Prijedor for whom Dr. Stakic had a special responsibility.”

(ii) multiple murders

Cesic, (Trial Chamber), March 11, 2004, para. 34: “A conviction for multiple murders further adds to the seriousness of the crime if brought under one count.”

(a) application—multiple murders

Bralo, (Trial Chamber), December 7, 2005, para. 32: “Count 2 of the Indictment relates to the murder of three captured Muslim men . . . by Bralo. . . . [T]he fact that there were multiple murder victims is an element which serves to aggravate the seriousness of Bralo’s criminal conduct.”⁶⁶

Limaj et al., (Trial Chamber), November 30, 2005, para. 727: “[I]t has been established that nine [detainees] were executed by Haradin Bala, and the other guard or guards, acting together. At least one detainee was not executed, but death befell the majority of those remaining detainees. This is the most grave aspect of the criminal conduct of Haradin Bala.”

See also Banoric, (Trial Chamber), October 28, 2003, Separate Opinion of Judge Patrick Robinson: “In all the circumstances of this case, including the aggravating and mitigating factors set out in this Judgement, I hold that the criminality of the Accused, involving as it does, five murders resulting from his participation in the beating of five persons, and the beating of twenty-seven others, warrants a longer term of imprisonment than eight years.”

⁶⁶ This decision evaluates gravity and aggravating circumstances together, stating: “The aggravating circumstances identified by the Prosecutor are all factors which may add to the gravity of the offences. Seeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise. . . .” *Bralo*, (Trial Chamber), December 7, 2005, para. 27.

(e) vulnerability of the victims

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 352: “The Trial Chamber can consider “the factor of the vulnerability of the victims in terms of the gravity of the offences.”

Deronjic, (Trial Chamber), March 30, 2004, para. 207: “The Trial Chamber in *Banovic* accepted that ‘the position of inferiority and the vulnerability of the victims as well as the context in which the offences were committed are relevant factors in assessing the gravity of the offence.’” See also *Banovic*, (Trial Chamber), October 28, 2003, para. 50.

Krstic, (Trial Chamber), August 2, 2001, para. 703: “[T]he circumstance that the victim detainees were completely at the mercy of their captors, the physical and psychological suffering inflicted upon witnesses to the crime, the ‘indiscriminate, disproportionate, terrifying’ or ‘heinous’ means and methods used to commit the crimes are all relevant in assessing the gravity of the crimes. . . . Appropriate consideration of those circumstances gives ‘a voice’ to the suffering of the victims.”

(f) youth of the victims

Bralo, (Trial Chamber), December 7, 2005, para. 31: “The Trial Chamber . . . finds that in some circumstances a crime can be aggravated by the youth of the victim involved. Such is the case, for example, where an accused is convicted of rape or sexual assault, or where he has committed murder.”

Krstic, (Trial Chamber), August 2, 2001, para. 702: “[T]he mistreatment of . . . children is especially significant.”

(i) application—youth of the victims

Bralo, (Trial Chamber), December 7, 2005, para. 31: “The fact that many of those who were killed, displaced, and traumatised by the attack on Ahmici were children, and that, of the fourteen members of the Salkic and Ceremic families who were killed by [a Croatian Defence Council (HVO)] soldier with the assistance of Bralo, nine were children, are important considerations. The Trial Chamber therefore finds that this aspect of the commission of the crime of persecution by Bralo in the present case is a factor that aggravates the gravity of the crime.”

(g) suffering of victims

Blagjevic and Jokic, (Trial Chamber), January 17, 2005, para. 833: “[T]he Trial Chamber will take into account the impact of the crimes on the victims.” See also *Mrdja*, (Trial Chamber), March 31, 2004, paras. 21, 123 (similar).

Babić (Trial Chamber), June 29, 2004, para. 47: In assessing gravity, “primary consideration” is to be given, among other things, to “the suffering inflicted upon the [victims].” *See also* *Cesic*, (Trial Chamber), March 11, 2004, para. 32 (victim suffering is among the “particular circumstances to be considered”); *Krstić*, (Trial Chamber), August 2, 2001, para. 702 (similar).

Đeronjić, (Trial Chamber), March 30, 2004, para. 210: “The consequences of the crime for the victims are relevant to the sentencing of the offender. Within this aspect, the extent of the long-term physical, psychological, and emotional suffering of the immediate victims is a relevant factor in determining the gravity of the offence.” *Krnjelac*, (Trial Chamber), March 15, 2002, para. 512 (similar).

Delalić et al., (Trial Chamber), November 16, 1998, para. 1226: “The gravity of the offences of the kind charged has always been determined by the effect on the victim”

(i) application—suffering of victims

Bralo, (Trial Chamber), December 7, 2005, paras. 37, 40: “The Prosecution has submitted several statements from people who survived the attack on Ahmici and whose relatives were killed in the course of that attack [on Ahmici and Nadioci].” “These statements paint a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma. The Trial Chamber is therefore mindful of the suffering of these victims, and of all of the other Muslim residents of Ahmici and Nadioci who were persecuted or otherwise abused by Bralo in the course of the attacks on their villages. It observes that the consequences of the persecution, murders, rape, and other crimes committed by Bralo are profound and long-lasting and takes this into consideration in its determination of sentence.”

Đeronjić, (Trial Chamber), March 30, 2004, para. 219: In evaluating gravity, the Trial Chamber stated: “[T]he scope and impact of the crime did not only affect specific individuals, but also the entire Bosnian Muslim community. The victims report unanimously that the Muslim community of Glogova completely disappeared after the attack. Muslim families are only slowly returning to the village, because they still have difficulties to overcome the fear and the terrifying memories of what happened to them. Many of them do not dare to go back or still have strong reactions of fear and panic when they visit the village”

Nikačević - Momir, (Trial Chamber), December 2, 2003, para. 113: Under the heading “Gravity of the Offence”: “The impact of the events of Srebrenica upon the lives of the families affected has created what is known as the ‘Srebrenica syndrome.’ The greatest and most stressful traumatic event for Srebrenica survivors is the disappearance of a large number of men, such that every woman suffered the loss of a husband, a father, brothers or uncles. In addition to the loss of numerous relatives, many of the families

do not know the truth regarding the fate of their family members and are still waiting for news. Children who witnessed separations suffer from a range of problems years after the events.”

Stakic, (Trial Chamber), July 31, 2003, para. 910: “The gravity of the crimes committed by Dr. Stakic is reflected in the tragic extent of the harm and suffering caused to the victims of the criminal campaign. The factors to be considered are the number of victims, the physical and mental trauma suffered by the survivors, and the social and economic consequences of the campaign for the targeted non-Serb group that comprised citizens of the Municipality of Prijedor for whom Dr. Stakic had a special responsibility.”

(h) impact on victims’ relatives and friends

Krnjelac, (Appeals Chamber), September 17, 2003, para. 260: “The Appeals Chamber states that the distinction between reparation and punishment is well known. Without crossing the dividing line that separates these two concepts, the case-law of some domestic courts shows that a trial chamber may still take into account the impact of a crime on a victim’s relatives when determining the appropriate punishment. The Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others.”

Mrdja, (Trial Chamber), March 31, 2004, paras. 21, 39, 40: “In determining the gravity of the crimes, the Trial Chamber will give consideration to [among other things] . . . the impact upon the victims and their families.” “The Trial Chamber considers that the impact of the murders on the victims and their families should be taken into consideration when evaluating the inherent gravity of the crimes for which Darko Mrdja has pleaded guilty. The Appeals Chamber’s Judgment in *Krnjelac* held that ‘the case law of some domestic courts shows that a trial chamber may still take into account the impact of a crime on a victim’s relatives when determining the appropriate punishment’ and that ‘even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others.’ Furthermore, the Judgement in *Delalic et al.* said that ‘the gravity of the offences of the kind charged has always been determined by the effect on the victims or, at the most, on persons associated with the crime and nearest relations.’” “The Trial Chamber is convinced that, on the basis of the evidence presented by the Prosecution, the families of the victims suffered severe pain from the lost [sic] of their relatives. This factor should be taken into consideration when determining the seriousness of the crimes.” *See also Mrdja*, (Trial Chamber), March 31, 2004, para. 123 (similar); *Cesic*, (Trial Chamber), March 11, 2004, para. 39 (similar).

Cesic, (Trial Chamber), March 11, 2004, para. 39: “The Trial Chamber finds that the impact on the victims’ relatives and friends is among the factors that are considered when evaluating the inherent gravity of a crime.”

Delalic et al., (Trial Chamber), November 16, 1998, para. 1226: “The gravity of the offences of the kind charged has always been determined by the effect on the victim or, at the most, on persons associated with the crime and nearest relations.”

(i) application—impact on victims’ relatives and friends

Obrenovic, (Trial Chamber), December 10, 2003, para. 76: In discussing the gravity of the crimes, the Trial Chamber stated: “The impact of the events of Srebrenica upon the lives of the families affected has created what is known as the ‘Srebrenica syndrome.’ The greatest and most stressful traumatic event for Srebrenica survivors is the disappearance of a large number of men, such that every woman suffered the loss of a husband, a father, brothers or uncles. In addition to the loss of numerous relatives, many of the families do not know the truth regarding the fate of their family members and are still waiting for news. Children who witnessed separations suffer from a range of problems years after the events.”

See also Krnojelac, (Appeals Chamber), September 17, 2003, para. 260: “In this instance, no consideration was given to the effect of the crimes on [victims’ relatives]. However, the Appeals Chamber believes that the fact that the Trial Chamber did not take this into account had no major impact on the sentence and that there is, therefore, no reason for changing it. The Prosecution did not provide the Appeals Chamber with sufficient evidence to enable it to assess the actual consequences of the crimes on the victims’ relatives.”

Compare Cesic, (Trial Chamber), March 11, 2004, para. 44: “[T]he Trial Chamber finds that the statements fail to establish that the persons affected by the murder and sexual assault of the victims experienced significantly more suffering than that usually incurred by the violent death of, or the inhumane acts suffered by, beloved ones.”

(i) the role of the accused (form of participation)

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 833: “By ‘gravity of the offence’ the Trial Chamber understands that it must consider [*inter alia*] . . . the specific role played by [each accused] in the commission of the crime.”

Mrdja, (Trial Chamber), March 31, 2004, para. 21: “In determining the gravity of the crimes, the Trial Chamber will give consideration to [among other things] . . . the role [the accused] played in their commission.” *See also Mrdja*, (Trial Chamber), March 31, 2004, para. 123 (similar).

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 114: “[W]hen assessing the gravity of the offence, the Trial Chamber must . . . consider the role that Momir Nikolic played in the commission of the crime. The Trial Chamber will examine Momir Nikolic’s formal functions and actual duties performed; the manner in which Momir Nikolic performed his tasks and duties during the planning, preparation and execution of the crimes; and the circumstances in which Momir Nikolic performed these tasks and duties.”

(i) application—the role of the accused (form of participation)

(a) coordinating the persecutory campaign in Prijedor, including establishing, with others, the Omarska, Keraterm and Trnopolje camps

Stakic, (Trial Chamber), July 31, 2003, para. 906: “Dr. Stakic played a unique pivotal role in co-ordinating the persecutory campaign carried out by the military, police and civilian government in Prijedor. Without repeating all that has already been set out in this Judgement, the Trial Chamber recalls in this context that Dr. Stakic had a significant role in planning and co-ordinating the forcible takeover of power on 30 April 1992, set the agenda for and presided over meetings of the Crisis Staff [in Prijedor], and took part in ordering attacks against non-Serbs. Together with his co-perpetrators, Dr. Stakic established the Omarska, Keraterm and Trnopolje camps and arranged for the removal from Prijedor municipality of those non-Serbs whose lives were to be spared. Such a wide-scale, complex and brutal persecutory campaign could never have been achieved without the essential contribution of leading politicians such as Dr. Stakic. It is vital that those responsible be held accountable for the consequences of their actions and the Trial Chamber takes notice of this factor when determining the appropriate sentence.” *See also Stakic*, (Trial Chamber), July 31, 2003, paras. 903, 907 (discussing gravity).

(b) prison camp guard not in command position

Limaj et al., (Trial Chamber), November 30, 2005, para. 726: Under the heading “The gravity of the offence”: “It is to be emphasized that the Accused Haradin Bala was not in a position of command in respect of the camp. The Prosecution has not been able to establish who was in command. The role of Haradin Bala was that of a guard. While he performed this role throughout the period of the camp’s existence, and was active in the day to day running of the prison, the evidence indicates that other KLA [Kosovo Liberation Army] members were involved, in particular, in many of the episodes of more violent mistreatment of detainees. The evidence does not establish, or even suggest, that Haradin Bala exercised any authority over these other KLA members or that he actively

instigated their mistreatment of detainees. Rather, his role was often as a mere attendant, apparently acting at the bidding of others.”

(c) acting under orders

Limaj et al., (Trial Chamber), November 30, 2005, para. 727: “[I]t has been established that nine [detainees] were executed by Haradin Bala, and the other guard or guards, acting together. At least one detainee was not executed, but death befell the majority of those remaining detainees. This is the most grave aspect of the criminal conduct of Haradin Bala. It is the effect of the evidence, however, in the Chamber’s finding, that Haradin Bala was acting under orders from a higher authority, whose identity is not established by the evidence, in marching the detainees to the mountains, releasing some, and executing nine. He did not murder the nine detainees on his own initiative.”

Mrdja, (Trial Chamber), March 31, 2004, para. 31: “The Trial Chamber accepts that Darko Mrdja was not the ‘architect’ of the massacre and that he was acting pursuant to orders along with other members of the Intervention Squad [a special unit of the Prijedor Police under the Bosnian Serb authorities in Prijedor].”

(d) not being one of the major perpetrators

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 835-836: In discussing the issue of gravity, the Trial Chamber stated: “In relation to Vidoje Blagojevic, the Trial Chamber finds that he was not one of the major participants in the commission of the crimes. The Trial Chamber has found that while commanders of the Main Staff and the [Ministry of the Interior in Republika Srpska] played the key roles in designing and executing the common plan to kill thousands of Bosnian Muslim men and to forcibly transfer over 30,000 Bosnian Muslims, Vidoje Blagojevic’s contribution to the commission of the crimes was primarily through his substantial assistance to the forcible transfer – assistance which the Trial Chamber found was rendered without him having knowledge of the organised murder operation – and due to his knowledge of the objective to eliminate the Bosnian Muslim enclave of Srebrenica. The Trial Chamber must consider, however, that the practical assistance he rendered had a substantial effect on the commission of the crime of genocide.”

“Dragan Jokic, like Vidoje Blagojevic, did not play a major role in the commission of the crimes. In addition, the Trial Chamber has found that he was not in a command position. He could not issue orders on his own, but conveyed the orders from superiors to the members of the Engineering Company of the Zvornik Brigade [of the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska)]. However, he substantially assisted in the commission of the crimes by sending machinery of the Engineering Company to the execution sites and members of the Engineering Company to take part in the burial operation.”

(e) accused only responsible for own role

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 815: “Despite the enormity of the crime base that underlies this case, the Trial Chamber must remember that in this case, as in all cases before the Tribunal, it is called upon to determine a sentence for two individuals, based solely on their particular conduct and circumstances.”

Obradovic, (Trial Chamber), December 10, 2003, para. 78: “It is recalled that the basis of liability for crimes within the jurisdiction of the Tribunal is *individual* criminal responsibility. An accused shall be held liable for *his* actions and omissions – no more and no less. In crimes as massive as those committed following the fall of Srebrenica, the Trial Chamber finds that it must be particularly vigilant in ensuring that its consideration of the gravity of the offence focuses on those acts or omissions of the individual accused for which he is personally responsible. The Trial Chamber recalls that there are at least seven people for whom indictments have been brought by the Tribunal for crimes committed in Srebrenica but remain at large, namely: Radovan Karadzic, President of the Republika Srpska and Supreme Commander of the VRS [Army of Republika Srpska]; General Ratko Mladic, Commander of the VRS Main Staff; Colonel Ljubisa Beara, Chief of Security of the VRS Main Staff; Lt. Colonel Vujadin Popovic, Assistant Commander for Security of the Drina Corps; Lt. Colonel Vinko Pandurevic, Commander of the Zvornik Brigade; Lieutenant Drago Nikolic, Assistant Commander for Security of the Zvornik Brigade; and Lt. Colonel Ljubisa Borovcanin, Deputy Commander of the MUP [Serbian Ministry of Internal Affairs] Special Police Brigade. Additionally, trial proceedings have concluded against three more persons: General Radislav Krstic, Commander of the Drina Corps; Momir Nikolic, Assistant Commander and Chief of Security and Intelligence of the Bratunac Brigade of the VRS; and Drazan Erdemovic, a soldier of the VRS 10th Sabotage Detachment.” (emphasis in original)

(j) the sentence should reflect the relative significance of the role of the accused in the context of the conflict in the former Yugoslavia, although not decisive

Delalic et al., (Appeals Chamber), February 20, 2001, para. 847: “The Appeals Chamber is satisfied that the appellants’ interpretation of the *Tadic* Sentencing Appeal Judgement is incorrect. That judgement did not purport to require that, in every case before it, an accused’s level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused’s place was by comparison low, a low sentence should automatically be imposed. Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime which ‘requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the accused in the crime.’ In

certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.” See also *Banović*, (Trial Chamber), October 28, 2003, para. 45 (quoting same).

Tadić, (Appeals Chamber), January 26, 2000, para. 55: “[T]he Trial Chamber’s decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda, fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.”

Cesic, (Trial Chamber), March 11, 2004, para. 32: “Regarding the form and degree of a convicted person’s participation, while the sentence imposed should reflect the relative significance of the role of an accused in the context of the conflict in the former Yugoslavia, it does not follow that, in case of a lesser significant role of an accused, the sentence would be necessarily low, as ‘a sentence must always reflect the inherent level of gravity of a crime.’” See also *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 115 (similar); *Stakić*, (Trial Chamber), July 31, 2003, para. 930 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 744 (similar).

**(i) application—the role of the accused in the
context of the conflict in the former Yugoslavia**

Cesic, (Trial Chamber), March 11, 2004, para. 37: “The evidence presented regarding Ranko Cesic’s exact position in the hierarchy is fragmented and inconclusive, although his enlisting in the territorial defence few days before he committed the crimes and the lack of any military career prior to May 1992, would indicate that he was in a rather low-ranking position. Nevertheless, this position has no direct bearing in determining the nature of his responsibility since he is convicted for having personally committed the crimes.”

Banović, (Trial Chamber), October 28, 2003, para. 45: “[T]he fact that the Accused was a low-level offender in terms of the overall structure of authority at the Keraterm camp or in Prijedor cannot alter the seriousness of the offences for which the Accused has been convicted, or the circumstances in which he committed them. In any event, the relative significance of the role of the Accused is not ultimately decisive of the determination of the sentence.”

(k) personal participation of the accused

Jokić - Miodrag, (Trial Chamber), March 18, 2004, para. 55: “The gravity of the crimes committed by the convicted person also stems from the degree of his participation in the crimes.”

(i) application—personal participation of the accused

Mrdja, (Trial Chamber), March 31, 2004, para. 31: “[T]he fact that [Darko Mrdja] personally participated in the selection of the civilians who were going to be killed [at Koricanske Stijene] and in their subsequent murder and attempted murder, knowing that a widespread and systematic attack against civilians was underway, makes the crimes charged especially serious.”

Cesic, (Trial Chamber), March 11, 2004, para. 36: “In assessing the gravity of the conduct of Ranko Cesic in the commission of these crimes [committed in Brecko municipality], the Trial Chamber notes that he personally participated in all the crimes. He himself committed the four murders referred to under Incident 1 and the murder referred to under Incident 2. He committed with others the murders referred to in Incidents 3 and 5 and committed, with the assistance of two other guards, the murders referred to under Incident 6. Regarding the sexual assault, Ranko Cesic actively participated in the violence inflicted upon the victims before the assault and initiated the assault by ordering it. Ranko Cesic hence is a perpetrator of all the crimes he is convicted of in the present case.”

Obrenovic, (Trial Chamber), December 10, 2003, para. 82: In assessing the gravity of the offenses, and the form and degree of participation of Dragan Obrenovic in the crime of persecution regarding crimes committed after the fall of Srebrenica, “[t]he Trial Chamber observes that the following actions are attributable personally to Dragan Obrenovic:

(a) Dragan Obrenovic released Drago Nikolic, the Zvornik Brigade Security Officer, from the Brigade’s Forward Command Post in order to prepare for the arrival of a huge number of Muslim prisoners from Bratunac in Zvornik to be shot there.

(b) Dragan Obrenovic ordered the commander of the Military Police of the Zvornik Brigade and five military policemen to assist Drago Nikolic, who had asked him to release the Military Police Company for assistance.

(c) While Dragan Obrenovic was in the field on 14 July 1995 leading his men in fighting against the 28th ABiH [Muslim Army of Bosnia-Herzegovina] Division, he was informed that Colonel Ljubisa Beara, Chief of Security of the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska] Main Staff, had brought a large number of prisoners in buses to the Zvornik area. Dragan Obrenovic then approved the release of two machine operators from the line, knowing that their task was to take part in the burial of prisoners.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 123: Under the heading “Gravity of the Offence”: “The Trial Chamber finds that Momir Nikolic was not simply ‘following orders’ as the Defence submits. Rather, Momir Nikolic took an active role in

furthering the commission of the crime. Specifically, the Trial Chamber finds that Momir Nikolic: was in Potocari on 12 July ‘co-ordinating’ activities including the transportation of women and children to Kladanj and the separation and detention of able-bodied Muslim men; ‘directed’ the work of the forces present in Potocari on 13 July; identified specific locations in and around Bratunac both for the detention and execution of Muslim men; and, in the fall of 1995, co-ordinated the exhumation and re-burial of Muslim bodies. Thus, the Trial Chamber must conclude that Momir Nikolic was an active and willing participant in the massive criminal operation carried out in the days and months following the fall of Srebrenica.”

Banovic, (Trial Chamber), October 28, 2003, para. 91: In discussing gravity: “The offence for which the Accused has been convicted [persecution] is made all the more serious by considering the underlying criminal offences. The Accused has acknowledged his direct, personal involvement in inflicting severe pain and bodily harm through violent beatings of detainees at the Keraterm camp [in Prijedor]. More significantly, Predrag Banovic has been convicted for participating in the beatings that caused the death of five detainees. His crimes are particularly serious in terms of the protected interests which he violated: the life as well as the physical and mental integrity of the victims, the consequences for the victims (death for five of them and great suffering for twenty-seven detainees), and the reasons for which the crimes were committed. Any sentence must necessarily reflect this factor.”

(ii) whether limited participation is a mitigating factor or diminishes gravity

Babic, (Appeals Chamber), July 18, 2005, para. 39: “With regard to whether the alleged limited participation of the Appellant must be considered as a mitigating factor or, as the Prosecution argues, as ‘diminishing the gravity of the offence,’ the Appeals Chamber recalls its previous finding in the *Aleksoski* Appeals Judgement, in which it endorsed the finding of the Trial Chamber in the *Kupreskic et al.* Trial Judgement that ‘[t]he determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.’ The Trial Chamber did so here, stating in the course of its discussion of the gravity of the Appellant’s offence that his participation was ‘significant’ and that he had ‘pleaded guilty as a co-perpetrator.’ Although these references are fairly brief, they are sufficient to demonstrate that the Trial Chamber duly considered the issue [E]ven if the Trial Chamber had addressed this factor [participation] only in the context of mitigation and not in the context of the gravity of the offence, this erroneous placement would not have been prejudicial; because the Trial Chamber did not commit any error in concluding that the Appellant’s participation was in fact significant, a more extensive discussion in the context of the gravity of the offence could not have been of assistance to the Appellant.”

(l) form of participation of the accused/ brutality of crime

Strugar, (Trial Chamber), January 31, 2005, para. 462: “[O]f relevance to the gravity of the offence is the form of the Accused’s participation in the commission of the crimes.”

Deronjić, (Trial Chamber), March 30, 2004, para. 154: “It is necessary to consider [among other things] the form and degree of the participation of the accused in the crime’ in order to determine the gravity of the crime.” *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 144 (same).

(i) application—form of participation of the accused/ brutality of crime

Bralo, (Trial Chamber), December 7, 2005, para. 29: “Beyond the inherently shocking nature of these crimes, the Trial Chamber also takes account of the specific manner in which they were committed by Bralo. In the course of his persecution of the Bosnian Muslim residents of Nadioci and Ahmici, who were the targets of attack on 16 April 1993 [by the “Jokers”—a so-called anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council (HVO)], Bralo killed a young woman—Mirnesa Salkić—with a knife, while his associates murdered her parents. In addition, he shot and killed an unidentified adult male after capturing and interrogating him. Moreover, Bralo set fire to many houses belonging to the Muslim residents of Ahmici using incendiary materials, aided and abetted others in doing so, and participated in the destruction of the lower mosque in Ahmici by setting and detonating approximately four kilos of explosives. At some time after the attack on Ahmici, Bralo aided another member of the [Croatian Defence Council (HVO)] in the killing of fourteen Bosnian Muslim civilians.”⁶⁷

(m)sexual assault, humiliation and degradation

Kvočka et al., (Trial Chamber), November 2, 2001, para. 702: “[T]he following should be taken into consideration: . . . [among other factors] the sexual violence inflicted upon the women, and the discriminatory nature of the crimes.”

⁶⁷ This decision evaluates gravity and aggravating circumstances together, stating: “The aggravating circumstances identified by the Prosecutor are all factors which may add to the gravity of the offences. Seeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise. . . .” *Bralo*, (Trial Chamber), December 7, 2005, para. 27.

(i) application—sexual assault, humiliation and degradation

Bralo, (Trial Chamber), December 7, 2005, paras. 33-34: “The Factual Basis for Counts 3 to 6 of the Indictment describes the horrific ordeal of a Bosnian Muslim woman—Witness A—at the hands of Bralo and other members of the ‘Jokers,’ over a lengthy period of time [at the Headquarters of the ‘Jokers’ and in the village of Nadioci]. Her brutal rape and torture, and her imprisonment for approximately two months to be further violated at the whim of her captors, are crimes of a most depraved nature. The Trial Chamber emphasises once again that international humanitarian law, along with basic principles of humanity, require that individuals who are detained during an armed conflict must be treated humanely, and that the rape and torture of a woman in this context is a most heinous crime requiring unequivocal condemnation.” “With regard to the exacerbated humiliation and degradation of Witness A by Bralo, the Trial Chamber finds that this should be considered as a factor which further aggravates the gravity of an already extremely serious offence.”

Cesic, (Trial Chamber), March 11, 2004, para. 35: “The family relationship and the fact that [brothers, forced at gunpoint to perform sexual acts upon one another at the Luka detention facility/camp] were watched by others make the offence of humiliating and degrading treatment particularly serious. The violation of the moral and physical integrity of the victims justifies that the rape be considered particularly serious as well.”

(n) willingness and enthusiasm of participation

(i) application—willingness and enthusiasm of participation

Bralo, (Trial Chamber), December 7, 2005, paras. 30, 35: “There can . . . be little doubt that Bralo was a willing participant in one of the most brutal attacks upon a community in the entire conflict in Bosnia and Herzegovina [the attack on the Muslim community of Ahmici].” “The charges contained in counts seven and eight of the Indictment pertain to the role of Bralo in the detention of Bosnian Muslim civilians, who were used as labourers in the digging of trenches in and around the village of Kratine. Bralo was among members of the [Croatian Defence Council (HVO)] who guarded these detainees and directed their work, in adverse weather conditions and with limited food or rest, under threat of physical harm. The enthusiasm of Bralo for this task, and his desire to humiliate these Muslim detainees, is evidenced by his conduct in forcing them to perform a Catholic religious ritual before work began. Moreover, the detainees were also at risk of being struck by sniper-fire from the Army of Bosnia and Herzegovina, as their positioning was such that they were used, by Bralo and others, as ‘human shields’ to protect the HVO forces from such sniper attack. Bralo was aware of the prospect that the detainees under his control might be injured or killed as a result of their positioning in this way, and yet did nothing to alleviate the situation. He must therefore

be considered as a knowing participant in yet another crime involving the serious mistreatment of detained civilians, a reprehensible offence. The fact that there were numerous victims of the crimes charged in counts seven and eight is also taken into account by the Trial Chamber as a factor that aggravates the gravity of these crimes.”

iv) aggravating and mitigating factors

(1) generally

(a) Trial Chamber obligated to take aggravating and mitigating factors into account

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 47: “The Appeals Chamber recalls that Trial Chambers are ‘required as a matter of law to take account of mitigating circumstances.’” *See also Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1051 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 696: “Rule 101(B) of the Rules provides that the Trial Chamber, in determining a sentence, shall consider, *inter alia*, ‘any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction.’” *See also Babić*, (Appeals Chamber), July 18, 2005, para. 43 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 850 (similar); *Mrdja*, (Trial Chamber), March 31, 2004, para. 57 (similar); *Obrenović*, (Trial Chamber), December 10, 2003, para. 104 (similar); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 140 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 1065 (similar).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 840: “Rule 101 (B)(i) of the Rules requires the Trial Chamber, in determining sentence, to examine any aggravating circumstances in relation to the crimes of which the accused stands convicted.” *See also Đeronjić*, (Trial Chamber), March 30, 2004, para. 185 (same); *Obrenović*, (Trial Chamber), December 10, 2003, para. 92 (same); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 129 (same).

Đeronjić, (Trial Chamber), March 30, 2004, para. 155: “In determining sentence, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances. . . .” *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 145 (same); *Galić*, (Trial Chamber), December 5, 2003, para. 759 (similar); *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 742 (similar).

(b) aggravating and mitigating factors not exhaustively defined

Babić, (Appeals Chamber), July 18, 2005, para. 43: “Neither the Statute nor the Rules exhaustively define the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of a sentence. Rule 101(B)(ii) of the Rules only states that in determining a sentence, a Trial Chamber shall take into account ‘any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction.’” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 728 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 465 (similar); *Babić*, (Trial Chamber), June 29, 2004, para. 48 (similar); *Galić*, (Trial Chamber), December 5, 2003, para. 759 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 685: “The factors to be taken into account in aggravation or mitigation of a sentence have not been defined exhaustively by the Statute or the Rules” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 838 (similar); *Obrenović*, (Trial Chamber), December 10, 2003, para. 91 (similar); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 125 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 465: “The jurisprudence has identified additional factors [in addition to cooperation] which a Chamber may take into account. These are not exhaustive. The Chamber must weigh the circumstances of each particular case to identify aggravating and mitigating circumstances and assess the weight to be accorded thereto.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 728 (similar).

Galić, (Trial Chamber), December 5, 2003, para. 759: “In general, factors peculiar to the convicted person are considered as aggravating or mitigating circumstances. By taking into consideration factors pertaining to the individual circumstances of the convicted person, the Trial Chamber is able to more accurately assess the possibility of rehabilitation.”

(c) Trial Chamber determines which factors to count

Blaskić, (Appeals Chamber), July 29, 2004, para. 685: “[A] Trial Chamber has considerable discretion in deciding how these [aggravating and mitigating] factors are applied in a particular case.”

Delalić, et al., (Appeals Chamber), February 20, 2001, para. 780: “[The] Trial Chambers are . . . endowed with a considerable degree of discretion in deciding on the factors which may be taken into account. A Trial Chamber’s decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 838: “[A] trial chamber has considerable discretion in deciding what constitutes such [aggravating and mitigating] factors.” See also *Obrenović*, (Trial Chamber), December 10, 2003, para. 91 (same); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 125 (same).

Cesic, (Trial Chamber), March 11, 2004, para. 47: “The Appeals Chamber [in the *Celebici*, a/k/a *Delalić*, case] has held that, since the factors to be taken into account for aggravation or mitigation of sentence have not been defined exhaustively by the Statute or the Rules, a Trial Chamber has ‘a considerable degree of discretion in deciding [these] factors.’” See also *Naletilić and Martinović*, (Trial Chamber), March 31, 2003, para. 742 (similar).

See also *Bralo*, (Trial Chamber), December 7, 2005, para. 27 (Trial Chamber has discretion as to “which factors may count in aggravation”); *Banović*, (Trial Chamber), October 28, 2003, para. 62 (Trial Chamber has discretion as to “which [factors] it considers to be of a mitigating nature”); *Plavsić*, (Trial Chamber), February 27, 2003, para. 65 (same as *Banović*).

(d) Trial Chamber determines weight to give factors

Blaskić, (Appeals Chamber), July 29, 2004, para. 696: “[A] Trial Chamber maintains discretion when deciding the weight to be attached to any mitigating circumstances.” See also *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 838 (similar); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 125 (same as *Blagojević*).

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 840: “The weight to be given to the aggravating circumstances lies within the discretion of the Trial Chamber.” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1096 (same).

Đermić, (Trial Chamber), March 30, 2004, para. 155: “[T]he weight to be given to the aggravating and mitigating circumstances is within the discretion of the Trial Chamber.” See also *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 145 (same).

(e) burden of proof

(i) aggravating factors

Blaskić, (Appeals Chamber), July 29, 2004, para. 688: “[T]he burden of proof in relation to aggravating factors is on the Prosecution to discharge beyond reasonable doubt” See also *Bralo*, (Trial Chamber), December 7, 2005, para. 42; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 729; *Strugar*, (Trial Chamber), January 31, 2005, para. 466; *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 840; *Obrenović*, (Trial Chamber), December 10, 2003, para. 91; *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 126.

Delalic et al., (Appeals Chamber), February 20, 2001, para. 763: “[O]nly those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.” See also *Brabo*, (Trial Chamber), December 7, 2005, para. 27 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 1096 (similar); *Babic*, (Trial Chamber), June 29, 2004, para. 48 (similar); *Cesic*, (Trial Chamber), March 11, 2004, para. 47 (same as *Brdjanin*); *Galic*, (Trial Chamber), December 5, 2003, para. 760 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 1064 (similar).

Kunarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 847: “[F]airness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt. . . .”

See also “considering mitigating factors agreed to in plea agreement does not violate the burden of proof,” Section (X)(b)(i)(5), ICTY Digest.

(ii) mitigating factors

Babic, (Appeals Chamber), July 18, 2005, para. 43: “The standard of proof with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt, but proof on a balance of probabilities: the circumstance in question must have existed or exists ‘more probably than not.’”

Blaskic, (Appeals Chamber), July 29, 2004, para. 697: “[T]he burden of proof . . . relating to mitigating factors is the balance of probabilities.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 850 (similar); *Babic*, (Trial Chamber), June 29, 2004, para. 48 (similar); *Deronjic*, (Trial Chamber), March 30, 2004, para. 155 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 920 (similar).

Brabo, (Trial Chamber), December 7, 2005, para. 42: “[M]itigating circumstances need only be proved on a balance of probabilities.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 729 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 466 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 1117 (same); *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 145 (similar); *Obrenovic*, (Trial Chamber), December 10, 2003, para. 91 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 759 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 126 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 1065 (similar); *Simic - Milan*, (Trial Chamber), October 17, 2002, para. 40 (similar); *Kunarac, Kovac, and Vukovic*, (Trial Chamber), February 22, 2001, para. 847 (similar).

**(iii) sample application—burden of proof:
mitigating factors**

Cesic, (Trial Chamber), March 11, 2004, para. 77: “The Defence is correct in maintaining that an accused is presumed innocent until proven guilty but the Trial Chamber does not agree that it follows that, when considering mitigation, all alleged criminal conduct, which Ranko Cesic was not convicted of, should be proven by the Prosecution beyond reasonable doubt. The Prosecution has not raised issues of character to establish that it is an aggravating factor. Instead, the Prosecution seeks to disprove the averment made by the Defence that Ranko Cesic is a man of good character. The Trial Chamber finds that it has a discretion to weigh up any relevant and reliable evidence in deciding whether the Defence has established that it is more likely than not that Ranko Cesic is a man of good character.”

For discussion of Appellate Chamber review of sentencing judgements, see (X)(e), ICTY Digest.

(2) aggravating factors

(a) aggravating factor may not be an element of the crime

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1089: “[T]he Appeals Chamber recalls that where an aggravating circumstance is at the same time an element of a crime, e.g. the discriminatory intent in the crime of persecutions, it cannot constitute an aggravating factor for purposes of sentencing.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 693: “The law relating to aggravating factors as applied by the International Tribunal is clear. Where an aggravating factor is present and yet is not an element of the crime, that factor may be considered in aggravation of sentence. However, where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 840: “The Trial Chamber notes that if a particular circumstance has been included as an element of the offence under consideration, it will not also be regarded as an aggravating factor.” *See also Brdjanin*, (Trial Chamber), September 1, 2004, para. 1096 (same).

Krnjelac, (Trial Chamber), March 15, 2002, para. 512: “Where such consequences [the suffering of the victims] are part of the definition of the offence, they may not be considered as an aggravating circumstance in imposing sentence. . . .”

See also Galic, (Trial Chamber), December 5, 2003, para. 760: “The jurisprudence of the Tribunal has also identified potentially aggravating factors, such as the type of criminal

participation, premeditation, discriminatory state of mind *where discrimination is not an element of the offence*, the motives of the convicted person, or the zealotry with which a crime was committed.” (emphasis added).

(i) application—overlap of aggravating factor and element of crime

(a) position of authority

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 30: “The Appeals Chamber notes that the Trial Chamber’s consideration of the Appellant’s abuse of his position of authority as an aggravating circumstance may have been inappropriate in light of the fact that it had convicted the defendant under Article 7(3) of the Statute, which essentially incorporates the Appellant’s authority as an element.” The Appeals Chamber, however, found the error to be harmless, since it vacated the conviction under Article 7(3).

Obrenović, (Trial Chamber), December 10, 2003, para. 99: “The Trial Chamber finds that Dragan Obrenović was in a position of authority as Acting Commander and Deputy Commander of the Zvornik Brigade [of the VRS (Army of Republika Srpska)]. The Trial Chamber recalls that Dragan Obrenović’s criminal liability arises in large measure from this responsibility as a commander pursuant to Article 7(3) of the Statute. The Trial Chamber finds it would be inappropriate to use the same conduct to both establish liability and to establish an aggravating circumstance in this case.”

Compare Babić, (Trial Chamber), June 29, 2004, para. 60: “The position of political leader is not required for participation in a [joint criminal enterprise], nor is it a precondition for the crime of persecution. Thus it is not an element establishing criminal liability. . . . [T]he Trial Chamber [is not precluded] from taking into consideration Babić’s leadership positions as an aggravating circumstance.”

(b) civilian status of the population/victims, or vulnerability of the victims

Đerongić, (Appeals Chamber), July 20, 2005, para. 127: “[T]he civilian status of the population against which the attack is directed is an element of crimes against humanity and . . . therefore such status cannot be taken into account as an aggravating circumstance.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 731: “[T]he Chamber has found that the Accused Haradin Bala is criminally responsible for the commission of the crimes of cruel treatment, torture and murder of civilian detainees. The status of the detainees as civilians (or persons not taking active part in the hostilities) cannot be taken into consideration as an aggravating factor given that it is already an element of the offences of torture, cruel treatment and murder under Article 3 of the Statute.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 843: “As the status of the victims has been taken into account as part of the definition of the crimes of which the Accused have been found guilty, the Trial Chamber cannot take that factor into account as an aggravating circumstance.” See also *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1104 (similar); *Cesic*, (Trial Chamber), March 11, 2004, para. 49 (similar); *Banovic*, (Trial Chamber), October 28, 2003, para. 49 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 1063 (similar). See also *Mrdja*, (Trial Chamber), March 31, 2004, para. 46 (similar regarding inhumane acts as a crime against humanity and murder as a violation of the laws or customs of war).

Jokic - Miodrag, (Trial Chamber), March 18, 2004, paras. 64-65: “The Trial Chamber deems that the convictions for murder, cruel treatment, and unlawful attack on civilians in the circumstances of this case entail that the victims of the unlawful attack had no direct role in the hostilities and that, therefore, they were vulnerable, unarmed and unable to defend themselves. The vulnerability of the civilians is, in other words, taken into account by the Trial Chamber as part of the definition of the crimes. . . . The Trial Chamber agrees that violence against certain groups of people, such as hospital patients, disabled people, people held in confinement (especially children and elderly) may, under certain circumstances, be considered in aggravation of the crimes. However, Miodrag Jokic has not been convicted of targeting civilians falling within a category of special vulnerability.” “The Trial Chamber therefore finds that the vulnerability of the victims cannot be considered an aggravating circumstance in the instant case as it has already been taken into account as part of the definition of the crimes.”

Banovic, (Trial Chamber), October 28, 2003, para. 49: “[T]he status of the victims as civilians does not necessarily aggravate the offence since the crime of persecution in Article 5(h) of the Statute for which the Accused is convicted includes the civilian character of the victims as an indispensable legal ingredient.”

**(c) ethnic and religious discrimination/
discriminatory intent**

Blaskic, (Appeals Chamber), July 29, 2004, para. 695: “The Appeals Chamber considers that the Trial Chamber in the instant case was entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence of any conviction which included that discrimination as an element of the crime of which he was convicted.”

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 171, 172: “When discussing the sentence, the Trial Chamber found that a discriminatory state of mind may constitute an aggravating factor when it is not an element of the crime in question. In paragraph 277 of the Judgement, the Trial Chamber held that a discriminatory state of mind is an element of the crime of persecution pursuant to Article 5(h) of the Statute and ‘may not

additionally aggravate that offence.’ In paragraph 278, however, the Trial Chamber held that a discriminatory state of mind may be used in aggravation in relation to offences for which it is not required as an element and accepted that, in relation to the conviction for murder pursuant to Article 3 of the Statute, the Appellant’s discriminatory state of mind does constitute an aggravating factor.”

Compare Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 1063: “As the elements of these offences [including] . . . discriminatory intent, form part of the requisite elements for the crimes charged to be made out [persecution as a crime against humanity], they will not be considered separately as aggravating factors.”

Compare Todorovic, (Trial Chamber), July 31, 2001, para. 57: “[T]he crime of persecution, on account of its distinctive features, is a particularly serious crime. . . . Since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorovic’s criminal conduct is already encompassed in a consideration of the offence. [I]t should not be treated separately as an aggravating factor.”

(d) scale and scope of the crimes

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 841: “The Prosecution submits that, in accordance with the *Blaskic* Trial Chamber, this Trial Chamber should consider the vast number of victims an aggravating circumstance. While agreeing that the number of victims of the crimes of both Vidoje Blagojevic and Dragan Jokic is, indeed, very large, the Trial Chamber finds that the scale of the crimes committed is reflected in the crimes for which each accused has been convicted, specifically complicity in genocide and extermination, respectively.”

Brdjanin, (Trial Chamber), September 1, 2004, paras. 1100-1101: “The Prosecution submits that the crimes committed in the ARK [Autonomous Region of Krajina] during 1992 were of the gravest nature both in terms of their numbers and in the extent of harm and suffering of the victims.” “The Trial Chamber finds that given the nature of the crimes of which the Accused has been found guilty [persecution, willful killing, torture, wanton destruction of cities, towns and villages not justified by military necessity, and destruction or willful damage done to institutions dedicated to religion], the scale and scope of these crimes are essentially subsumed in the overall gravity of those crimes and have already been taken into consideration in making that assessment. Accordingly, the Trial Chamber will not treat them as aggravating factors separately.”

(e) exacerbated humiliation

Cesic, (Trial Chamber), March 11, 2004, para. 53: “[T]he Appeals Chamber has recently deemed that, when the same criminal conduct is cumulatively charged under two separate counts, a factor taken into account as an element of the crime under one count does not prevent its being considered as an aggravating factor under the other count for

the determination of the sentence. In the present case, humiliation is clearly an element of the crime of humiliating and degrading treatment, as a violation of the laws or customs of war, while it is not explicitly an element of the crime of rape. However, it is uncontested that rape is an inherently humiliating offence and that humiliation is always taken into account when appreciating the inherent gravity of this crime. The distinction between the crimes thus lies in the emphasis placed on this particular aspect of the offence. The crime of humiliating and degrading treatment clearly places emphasis on the humiliation caused to the victims. Consequently, the Trial Chamber would not normally treat very serious humiliation as an aggravating circumstance in the context of this particular crime but would rather consider it in appreciating the gravity of the crime. By contrast, the crime of rape, although inherently humiliating, places emphasis on the violation of the physical and moral integrity of the victim. Under these circumstances, exacerbated humiliation may be considered in aggravation of this crime.”

(b) same fact should not be evaluated both regarding gravity and as an aggravating factor—double-counting is impermissible

See case law discussed in Section (IX)(c)(iii)(3)(b) , ICTY Digest.

(c) aggravating circumstances must be directly related to the offense charged

Deronjic, (Appeals Chamber), July 20, 2005, para. 124: “Only those circumstances directly related to the commission of the offence charged *and* to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation.” “The statement by the *Kumarac et al.* Trial Chamber that aggravating circumstances must relate ‘to the offender himself’ is not to be taken as a rule that such circumstances must specifically pertain to the offender’s personal characteristics. Rather, it simply reflects the general principle of individual responsibility that underlies criminal law: a person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible. So, for instance, individuals are not held responsible – either for the purposes of conviction or sentencing – for the unforeseeable acts of others involved in carrying out a plan.” (emphasis in original)

Limaj et al., (Trial Chamber), November 30, 2005, para. 729: “Aggravating circumstances must be directly related to the commission of the offence” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 466 (same); *Brljanin*, (Trial Chamber), September 1, 2004, para. 1096 (similar); *Deronjic*, (Trial Chamber), March 30, 2004, para. 185 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 1064 (similar); *Stakic*, (Trial Chamber), July 31, 2003, para. 911 (similar).

**(i) application—aggravating circumstances must
be directly related to the offense charged**

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 846: “The Trial Chamber does not consider the educational background of the Accused to be a circumstance directly related to the commission of the offence. Accordingly, the Trial Chamber will not treat this as an aggravating circumstance for the Accused.”

But see “professional background of the accused” as an aggravating circumstance, Section (IX)(c)(iv)(2)(g), ICTY Digest, for a discussion of cases where educational/professional background is considered as an aggravating circumstance.

(d) list of some aggravating factors

Blaskić, (Appeals Chamber), July 29, 2004, para. 686: “Aggravating circumstances must be proved by the Prosecution beyond reasonable doubt and include the following: (i) the position of the accused, that is, his position of leadership, his level in the command structure, or his role in the broader context of the conflict of the former Yugoslavia; (ii) the discriminatory intent or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime; (iii) the length of time during which the crime continued; (iv) active and direct criminal participation, if linked to a high-rank position of command, the accused’s role as fellow perpetrator, and the active participation of a superior in the criminal acts of subordinates; (v) the informed, willing or enthusiastic participation in crime; (vi) premeditation and motive; (vii) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims; (viii) the status of the victims, their youthful age and number, and the effect of the crimes on them; (ix) civilian detainees; (x) the character of the accused; and (xi) the circumstances of the offences generally.”

Babić, (Trial Chamber), June 29, 2004, para. 48: “Potentially aggravating factors, such as the mode of criminal participation or the presence of premeditation, have . . . been identified.”

Galic, (Trial Chamber), December 5, 2003, para. 760: “The jurisprudence of the Tribunal has . . . identified potentially aggravating factors, such as the type of criminal participation, premeditation, discriminatory state of mind where discrimination is not an element of the offence, the motives of the convicted person, or the zealotry with which a crime was committed.”

(e) scale and scope of the crimes/ number of victims

Đerónjić, (Appeals Chamber), July 20, 2005, para. 124: “The Appeals Chamber notes that it has often affirmed the use of aggravating factors related to victim characteristics such

as . . . the number of victims . . . , all features of the crime of which an accused is aware or could be expected to foresee and for which it is fair to hold him responsible.”

Kumarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 866: “The involvement of more than one victim in his offences is also considered in aggravation.”

See also Brdjanin, (Trial Chamber), September 1, 2004, para. 1103: “The Trial Chamber agrees that the number of victims reflects the scale of the crimes committed and amounts to an aggravating circumstance, but as scale has already been considered in assessing the gravity of the crimes, it will not be considered here.”

See also Blaskic, (Trial Chamber), March 3, 2000, para. 784: “The number of victims has been raised on several occasions as an aggravating circumstance and reflects the scale of the crime committed. By noting that the crimes were committed systematically, the Trial Chambers also took into account as aggravating circumstances the recurrence of the crimes.”

(i) application—scale and scope of the crimes/ number of victims

Deronjic, (Trial Chamber), March 30, 2004, paras. 222, 186: “[T]he Trial Chamber accepts the following factors as aggravating: . . . [t]he large number of civilians who were killed, subjected to the risk of being killed, forcibly displaced, and deprived of their property. . . .” “As a result of the persecutory acts to which the Accused pleaded guilty, 64 identified Bosnian Muslim civilians were killed [in the village of Glogova]. In addition, an unspecified number of Bosnian Muslim civilians were forcibly displaced and deprived of their property.” *See also Deronjic*, (Appeals Chamber), July 20, 2005, para. 110 (the Trial Chamber considered the large number of victims as an aggravating circumstance).

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 213, 206: “[T]he high number of victims in [the] Susica camp and the multitude of criminal acts have to be taken into account.” “Although most of the detainees were not direct victims of the Accused’s brutal acts of murder, torture and sexual violence as described above, each and every detainee of the camp was an immediate victim of the more insidious forms of abuse, specifically the inhumane living conditions and the atmosphere of terror created by the murders, beatings, sexual violence and other mental and physical abuse.”

Prosecutor v. Erdemovic, Case No. IT-96-22 (Trial Chamber), March 5, 1998, para. 15: “[T]he scale of the accused’s role [using an automatic rifle to kill up to one hundred people himself] in [the crime constitutes] aggravating circumstances to be taken into account.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 15: “[T]he magnitude of the crime [hundreds of Bosnian Muslim civilian men murdered by an execution squad] . . . [constitutes] aggravating circumstances to be taken into account.”

(f) position of the accused/ abuse of position of authority

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 28: “[T]he Trial Chamber was required to take the Appellant’s superior position into account as an aggravating factor at sentencing, as it was agreed upon by the parties and accepted by the Trial Chamber that the Appellant held a leadership position.”

Deronjić, (Appeals Chamber), July 20, 2005, para. 67: “The Appeals Chamber recalls that a Trial Chamber has the discretion to find that the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute may be taken into account as an aggravating circumstance. As the Trial Chamber correctly recognised, a high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. In the [ICTR’s] *Kambanda* case, for example, the Appeals Chamber concluded that the Trial Chamber had committed no error in considering as an aggravating factor the fact that Jean Kambanda had abused his position of authority and the trust of the civilian population, since he, as Prime Minister, was responsible for maintaining peace and security, and yet instigated, aided and abetted the massacre of civilians. In the *Aleksovski* case, the Appeals Chamber maintained that the appellant’s ‘superior responsibility as a warden seriously aggravated the [a]ppellant’s offences, [and that] instead of preventing it, he involved himself in violence against those whom he should have been protecting.’”

Babić, (Appeals Chamber), July 18, 2005, para. 80: “The Appeals Chamber notes that . . . the position of an accused in ‘high political offices’ has been considered as an aggravating factor for the purposes of sentencing even where an accused’s leadership of a joint criminal enterprise is not at issue. Several cases before the International Tribunal in which the mode of liability of joint criminal enterprise was not at issue illustrate that a Trial Chamber has the discretion to take into account, as an aggravating circumstance, the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute. A high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised. For instance, in the *Aleksovski* case, the Appeals Chamber considered that the superior responsibility of the appellant, who was a prison warden, ‘seriously aggravated [his] offences, [as] [i]nstead of preventing it, he involved himself in violence against those whom he should have been protecting.’ In *Ntakirutimana*, the ICTR Appeals Chamber concurred with the Trial Chamber that the

abuse of the appellant's personal position in the community was an aggravating circumstance.”

Kupreskic, (Appeals Chamber), October 23, 2001, para. 451: “[A] Trial Chamber has the discretion to find that direct responsibility, under Article 7(1) of the Statute, is aggravated by a perpetrator's position of authority.” *See also Deronjic*, (Trial Chamber), March 30, 2004, para. 187 (quoting same).

Delalic et al., (Appeals Chamber), February 20, 2001, para. 736: “There is no doubt that abuse of positions of authority or trust will be regarded as aggravating.”

Brjanin, (Trial Chamber), September 1, 2004, para. 1099: “The Trial Chamber accepts that a high-ranking position of leadership held by a person criminally responsible under Article 7(1) of the Statute may be taken into account as an aggravating factor. In the *Krstic* case, the Trial Chamber justified this proposition by stating that ‘a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own. The consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes.’”

Babic, (Trial Chamber), June 29, 2004, para. 59: “The jurisprudence of the Tribunal accepts that a high-ranking position of leadership held by a person criminally responsible under Article 7(1) of the Statute may be taken into account as an aggravating factor, although to what degree depends on the actual level of authority and the form of direct participation. In the *Krstic* case, the Trial Chamber justified this proposition by stating that ‘the consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes.’ In the *Kordic* case, the fact that Dario Kordic was a regional political leader who was not found to be an architect of the campaign of persecutions against non-Croat populations in the Lasva Valley of Bosnia and Herzegovina, aggravated the offences. Similarly, in the *Mrdja* case, Darko Mrdja pleaded guilty to the crime of murder and the Trial Chamber found that the fact that he was a policeman aggravated, to a limited extent, his sentence because ‘the commission of this type of crime undoubtedly violated the public authority invested in police officers.’”

Mrdja, (Trial Chamber), March 31, 2004, para. 51: “The Trial Chamber deems that committing a crime while exercising a public function – such as that of a policeman – may be considered as an aggravating factor. A policeman is vested with authority and a duty to uphold law and order. Civilians subjected to his authority are entitled to expect that a person of his role will abide by this duty. If the policeman commits a crime in the exercise of his function, the breach of public duty and legitimate expectations attaching to his function should be considered as an aggravating factor.”

Deronjic, (Trial Chamber), March 30, 2004, paras. 194, 195: “As the Trial Chamber in *Stakic* and *Dragan Nikolic* has expressed: ‘The commission of offences by a person in such a prominent position aggravates the sentence substantially.’ The Appeals Chamber endorsed that: ‘[...] the Accused’s seniority or position of authority [may be considered as] aggravating his direct responsibility under Article 7(1).’” “The Trial Chamber accepts that the mere fact that the Accused held a high political rank at the time of the attack does not as such constitute an aggravating factor.”

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 61: “The Trial Chamber agrees with the parties that the position of authority and power of a high ranking officer qualifies as an aggravating circumstance, in accordance with the case law of the Tribunal, due to the far-reaching consequences of the officer’s improper exercise of his or her authority and power.”

Ovrenovic, (Trial Chamber), December 10, 2003, para. 99: “The Trial Chamber notes that the position of leadership of an accused can be considered as aggravating factor. The actual authority is of consequence, whereby not only high-ranking, but also a middle-ranking command position can aggravate the sentence.”

Krstic, (Trial Chamber), August 2, 2001, para. 709: “A high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own. The consequences of a person’s acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes.”

Kunarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 863: “[T]he criminal culpability of those leading others is higher than those who follow.”

Blaskic, (Trial Chamber), March 3, 2000, para. 788: “[T]here can be no doubt that command position may justify a harsher sentence.” A “command position” is classified “as an aggravating circumstance.” “Command position must . . . systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime.”

For discussion that, where it is possible to convict under both Articles 7(1) and 7(3), the conviction should be entered under Article 7(1), and the fact that both types of responsibility were proven should be considered as an aggravating factor, see Sections (IX)(b)(ix)(8)(b)-(c), ICTY Digest.

(i) whether the “white gloves” perpetrator deserves a higher penalty than one who physically committed the crime

Stakić, (Trial Chamber), July 31, 2003, para. 918: “The Trial Chamber notes that, as with white collar crimes, the perpetrator behind the direct perpetrator – the perpetrator in white gloves – might deserve a higher penalty than the one who physically participated depending on the particular circumstances of the case.”

(ii) application—position of the accused/ abuse of position of authority

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 29: “The Trial Chamber expressly considered the Appellant’s leadership position in its discussion of aggravating circumstances and held:

[...] when determining the sentence, the Trial Chamber considers in aggravation the position of Miodrag Jokić [as commander of the Ninth Naval Sector (VPS) Boka, Montenegro of the Yugoslav Navy] and the influence of this position on the overall situation.

Thus, the Trial Chamber fully recognized, as an aggravating factor, that the Appellant held a position of authority and the power of a high-ranking officer over others committing the crimes charged . . . as is reflected in the sentence imposed.”

Deronjic, (Appeals Chamber), July 20, 2005, para. 69: “The Appeals Chamber finds that all [the] evidence enabled the Trial Chamber to conclude that the Appellant’s political power and authority as the President of the Bratunac Crisis Staff and the Municipality Board vested him with a particular responsibility towards the population of Bratunac, and that he abused his power and authority.”

Babić, (Appeals Chamber), July 18, 2005, para. 81: “In the present case, the Trial Chamber did not hold that the Appellant’s position as a regional political leader in itself constituted an aggravating circumstance. The Trial Chamber thoroughly considered the Appellant’s behaviour as a regional political leader and stressed that it considered his leadership position as an aggravating circumstance because he used his authority to enlist resources of the SAO [Serbian Autonomous District of] Krajina to further the joint criminal enterprise, made inflammatory speeches during public events and in the media which prepared the ground for the Serb population to accept that their goals could be achieved through acts of persecution, and amplified the consequences of the campaign of persecutions by allowing it to continue. Therefore, the Appeals Chamber considers that the Trial Chamber correctly found that the Appellant’s leadership position was an aggravating circumstance.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1088: The Appeals Chamber considered as an aggravating circumstance “the Accused’s position as a

middle-ranking [Croatian Defence Council] commander.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 727: “The aggravating circumstances proved beyond reasonable doubt are: (i) the position of the accused as holding the rank of Colonel in the [Croatian Defence Council (army of the Bosnian Croats)], and the position of commander of the regional forces in the [Central Bosnia Operative Zone]; and (ii) the fact that many of the victims of the crimes of which the Appellant has been found guilty were civilians.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 256: “The Appeals Chamber takes the view that the Trial Chamber was entitled to find that Krnjelac’s pre-eminent position within the [KP Dom prison complex in Foca] aggravated, at the very least, the aiding and abetting of cruel treatment and persecution of which he was guilty with respect to the detainees.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1099: “In the instant case, the Trial Chamber is satisfied that the Accused held positions of political authority at the highest level in the [Autonomous Region of Krajina] [such as First Vice-President of the Assembly of the Association of the Bosanska Krajina Municipalities, President of the Crisis Staff of the Autonomous Region of Krajina, and as a prominent member of the Serbian Democratic Party] and that he abused this authority in a way which discriminated against Bosnian Muslims and Bosnian Croats and brought them great harm and misery. The Trial Chamber therefore agrees with the Prosecution that it is appropriate to consider the Accused’s senior position and his abuse of authority as an aggravating factor of considerable weight.”

Babic, (Trial Chamber), June 29, 2004, paras. 56, 61: “Babic admitted that during the period covered by the Indictment he was a high-ranking regional political leader. He held prominent and central functions in the SDS [Serbian Democratic Party of Bosnia and Herzegovina] in Croatia, and at all times covered by the Indictment he was President of the SDS Municipal Assembly in Knin. From 29 May 1991 he also served as President of the administration of the self-declared [Serbian Autonomous District of] Krajina, and he was subsequently elected President of the [so-called Republic of Serbian Krajina] when that entity was proclaimed on 19 December 1991.”

“The reasons for holding that Babic’s leadership positions should indeed be considered as an aggravating circumstance are twofold. First, as a regional political leader he enlisted the resources of the [so-called Serbian Autonomous District of Krajina] to further the joint criminal enterprise and by his speeches and media exposure prepared the ground for the Serb population to accept that their goals could be achieved through acts of persecution. Second, Babic’s involvement through the positions he held gained momentum over time: by allowing the campaign of persecutions to continue he amplified its consequences. The Chamber finds that the reasons for which Babic remained in his positions, that is, vanity and ‘ethno-egoism,’ are taken into account in

support of his leadership position being an aggravating circumstance and do not count in mitigation.”

Deronjic, (Trial Chamber), March 30, 2004, paras. 187, 194, 199, 201, 195: “The Accused is individually criminally responsible pursuant to Article 7(1) of the Statute for committing acts of Persecutions in Glogova. His position as a political leader aggravates the offence. . . .”

“[The accused’s] position of authority as an influential civilian leader, due to his status as President of the Crisis Staff and of the Municipal Board [in Bratunac, in Eastern Bosnia], gave the Accused a particular responsibility towards the population in his municipality. However, he abused this authority vested to him. . . .”

“In the evening of 8 May 1992, the Accused, in his capacity as the President of the Crisis Staff of the Municipality of Bratunac, ordered the attack on Glogova. . . . He used his *de facto* and *de jure* control over the [Territorial Defence] and his *de facto* power over the police in the Municipality of Bratunac to order the attack on the village, burn part of it down, and forcibly displace its Bosnian Muslim residents.” “The own words and acts of the Accused illustrate his leading position in the operation.” “In this case . . . the Accused indeed abused his political power to commit the crimes he is charged with.”

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 62: “[W]hen determining the sentence, the Trial Chamber considers in aggravation the position of Miodrag Jokic [as commander of the Ninth Naval Sector (VPS) Boka, Montenegro of the Yugoslav Navy] and the influence of this position on the overall situation.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 179, 182, 183, 213: “The Accused admitted having been a commander in [the] Susica camp. . . . As a commander in [the] Susica camp, he had an overall responsibility to protect the detainees from abuse and to ensure that the conditions under which they were forced to live were humane. Instead he chose to mistreat the detainees, thereby setting an example for the guards to follow and contributing to an environment of impunity.” “The Accused deliberately and callously committed the crimes in the Indictment. He was not under any orders from his superiors, nor was he under any compulsion or pressure to behave in this manner.” “Dragan Nikolic used his position of authority to intimidate the detainees and prevent them from resisting. The Accused’s abuse of his superior position in the camp in principle aggravates his crimes. The detainees lived and died by the hand and at the whim or will of Dragan Nikolic.” “The Accused’s role was one of a commander in the camp and the Accused knowingly abused that position”; that was an “especially aggravating” factor.

Galic, (Trial Chamber), December 5, 2003, paras. 765, 767: “The Majority finds that the fact that General Galic occupied the position of VRS [Republika Srpska Army] Corps commander, and repeatedly breached his public duty from this very senior position, is an aggravating factor.” “The Majority of the Trial Chamber’s overall assessment is that

General Galic was a professional soldier who not only made little effort to distinguish civilian from military objectives but willingly oversaw the targeting of civilians in Sarajevo.” *But see Galic*, (Trial Chamber), Separate and Partially Dissenting Opinion of Judge Nieto-Navia, December 5, 2003, para. 121 (arguing that Galic’s position as a military commander should not have been considered an aggravating factor because it was considered in finding him responsible for ordering the crimes under Article 7(1).)

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 135: “The Trial Chamber finds that Momir Nikolic was in a position of authority as Assistant Commander and Chief of Security and Intelligence [of the Bratunac Brigade of the VRS (Army of the Republika Srpska)]. While his tasks largely consisted of implementing rather than giving orders, Momir Nikolic directed the military police of the Bratunac Brigade, as well as co-ordinated other units, this was of significance to the implementation and completion of the underlying criminal acts committed following the attack on Srebrenica. The role that Nikolic played and the functions that he performed, while not in the capacity of a commander, were of significant importance to the overall ‘murder operation’ that was ongoing. Therefore, the Trial Chamber finds his position and role to be aggravating factors.”

Banovic, (Trial Chamber), October 28, 2003, para. 55: “The Trial Chamber is satisfied that the Accused abused his position of authority over the detainees [at the Keraterm camp in Prijedor] while on duty, mistreating and beating them in total disregard for human life and dignity. The Trial Chamber considers this an aggravating factor.”

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, paras. 1078, 1082: “[I]n relation to the criminal responsibility of Blagoje Simic, the Trial Chamber is satisfied that Blagoje Simic was a leading member of the joint criminal enterprise, which purpose was the taking of power in the Bosanski Samac Municipality, and entailed the removing of Bosnian Muslims and Bosnian Croats, regardless of whether they opposed the takeover or not. Blagoje Simic was the most prominent representative of the civilian authorities to take part in the enterprise.” “The Trial Chamber agrees with the Prosecution submission that Blagoje Simic’s position as the President of the Crisis Staff, and later of the War Presidency [in Bosanski Samac] should be considered as an aggravating factor, particularly as he headed these institutions throughout their entire existence. As noted above, as the most important civilian leader within the Municipality, he had a particular responsibility towards the entire population, even in times of armed conflict.”

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, paras. 1108, 1105: “The Trial Chamber finds Simo Zarić’s education and background to be aggravating circumstances. The Trial Chamber accepts, that due to the various positions he occupied, including that of chief of the Public Security Station in Bosanski Samac prior to the armed conflict, Simo Zarić was a respected community leader, whose conduct influenced or supported others.” “By accepting to conduct interrogations of detainees he knew were subjected to

brutal mistreatment, Simo Zaric allowed such mistreatment to continue and prolonged the unlawful detention of detainees. The Trial Chamber has accepted that Simo Zaric's initiative to transfer a group of detainees from the [Territorial Defence] in Bosanski Samac to Yugoslav National Army barracks in Brcko may have temporarily allowed for an improvement of their detention conditions. This act, however, may also be regarded as indicative that Simo Zaric had the power, due to his status within the 4th Detachment, to influence the course of events, and did not use it at other times, or later when most of the same detainees were brought back to Bosanski Samac, to the schools for further detention."

Stakic, (Trial Chamber), July 31, 2003, para. 913: "It is indisputable that as President of the Prijedor Municipal Assembly, the Prijedor Municipal People's Defence Council, the SDS [Serbian Democratic Party] Crisis Staff of Prijedor Municipality, and the Prijedor Municipal Crisis Staff, Dr. Stakic held a high position within the Municipality and was a figure of the greatest authority. The commission of offences by a person in such a prominent position aggravates the sentence substantially."

Plavsic, (Trial Chamber), February 27, 2003, para. 57: "The Trial Chamber accepts that the superior position of the accused is an aggravating factor in the case. The accused was not in the very first rank of the leadership: others occupied that position. She did not conceive the plan which led to this crime and had a lesser role in its execution than others. Nonetheless, Mrs. Plavsic was in the Presidency, the highest civilian body, during the campaign and encouraged and supported it by her participation in the Presidency and her pronouncements."

Simic - Milan, (Trial Chamber), October 17, 2002, para. 67: "[W]hile [Milan Simic] was not charged as a superior *per se*, his position of authority [as President of the Executive Board of the Municipal Assembly of Bosanski Samac and a member of the Serb Crisis Staff for the city of Bosanski Samac] is nonetheless relevant, as an aggravating factor. Considering his position, Milan Simic's participation in the torture of the detainees . . . must have left the impression on those present with him in the primary school at the time that this type of conduct was permissible, or even, encouraged."

Sikirica et al., (Trial Chamber), November 13, 2001, paras. 138-139: "Dusko Sikirica has admitted to being 'Commander of Security' at the Keraterm camp [in Prijedor] and, as such, that there was a 'technical duty upon him to prevent the entry of persons from outside the camp.'" "Dusko Sikirica's failure in his duty to prevent outsiders from coming into the camp to mistreat the detainees is an aggravating factor."

Sikirica et al., (Trial Chamber), November 13, 2001, para. 172: "Damir Dosen's position as shift leader is an aggravating factor in relation to this crime. He was in a position of trust which he abused: he permitted the persecution of, and condoned violence towards, the very people he should have been protecting."

Compare Tadić, January 26, 2000, (Appeals Chamber), para. 56: “Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.”

Compare Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 848: “The Trial Chamber has found that the role of Vidoje Blagojević in relation to the crime for which he has been convicted was not that of a commanding officer issuing orders, but the role of a commander who facilitated the use of Bratunac Brigade [of the VRS (Army of Republika Srpska)] personnel and assets under his command. Therefore, the Trial Chamber considers the role of Vidoje Blagojević in the commission of the crimes to have been a limited one. Accordingly, the Trial Chamber will not take the position of authority of, nor abuse of authority by, Vidoje Blagojević into account as an aggravating circumstance.”

Compare Mrija, (Trial Chamber), March 31, 2004, paras. 53-54: “The Trial Chamber accepts that Darko Mrdja was a low ranking police officer and was not in a position of command.” “In the light of the above, the Trial Chamber finds that the position of Darko Mrdja as a policeman is an aggravating factor, but it does attach limited weight to it.”

Compare Česić, (Trial Chamber), March 11, 2004, para. 50: “Ranko Česić’s exact position in the military or police hierarchy is unclear. However, he was undoubtedly of low rank. The Prosecution’s argument that he abused his position of authority should therefore be rejected.”

For cases discussing the inappropriateness of considering abuse of a position of authority as an aggravating factor where it is also part of the elements of a conviction under Article 7(3) of the Statute, see “application—overlap of aggravating factor and element of crime,” “position of authority,” Section (IX)(c)(iv)(2)(a)(i)(4), ICTY Digest.

(g) professional background of the accused

(i) application—professional background of the accused

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 678: “It is . . . evident from the Trial Judgement that the Trial Chamber took Kvočka’s professional status into consideration in determining his sentence. The Trial Chamber notes that Kvočka was described as ‘a competent, professional policeman’ and states that ‘[h]is experience and integrity can be viewed as both mitigating and aggravating factors.’ The Trial Chamber, noting that Kvočka apparently did a fine job of maintaining law and order prior to working in the camp, evidently considered his previous integrity a mitigating

circumstance, which it was entitled to do. The Trial Chamber, however, was also correct in considering this experience an aggravating factor, once Kvočka held a position of authority. Thus, the defendant has not shown any discernible error on the part of the Trial Chamber.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1114: “The Trial Chamber finds that the Accused was an intelligent, university-educated person, who knew exactly the import and consequences of his actions. The Trial Chamber finds that these facts constitute an aggravating factor. However, given the circumstances of the present case, where the Accused’s position of power and authority and his abuse thereof is certainly much more important, this aggravating factor will not be given undue weight.”

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 1084: “The Trial Chamber agrees with the Prosecution that the fact that Blagoje Simić is intelligent, educated and a member of the medical profession constitute an aggravating circumstance. This is especially so in light of the fact that the systematic brutal mistreatment of Bosnian Muslim and Bosnian Croat detainees was brought to his attention, and he appears to have done nothing to alleviate their hardship. The Trial Chamber agrees with the approach taken in cases before the ICTR, and in *Stakić* that the professional background of Blagoje Simić as a medical doctor is an aggravating factor, although not a significant one.”

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 1095: “The Trial Chamber finds that the fact that Miroslav Tadić, as a school teacher, is an intelligent and educated man is an aggravating factor.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1108: “The Trial Chamber finds Simo Zarić’s education and background to be aggravating circumstances.”

Stakić, (Trial Chamber), July 31, 2003, para. 915: “The [ICTR] Trial Chamber in *Ntakirutimana* held in respect of Gerard Ntakirutimana, that “[h]e is particularly egregious that, as a medical doctor, he took lives instead of saving them. He is accordingly found to have abused the trust placed in him in committing the crimes of which he was found guilty.” Similarly in [the ICTR cases of] *Kayishema and Ruzindana*, it was found to be an aggravating circumstance that Kayishema was an educated medical doctor who betrayed the ethical duty that he owed to his community. The Trial Chamber follows the approach taken by the Rwanda Tribunal in considering the professional background of Dr. Milomir Stakić as a physician to be an aggravating factor, albeit not a significant one.”

But see Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 846: “The Trial Chamber does not consider the educational background of the Accused to be a

circumstance directly related to the commission of the offence. Accordingly, the Trial Chamber will not treat this as an aggravating circumstance for the Accused.”

(h) active, direct or personal participation, particularly of commander

Delalic et al., (Appeals Chamber), February 20, 2001, para. 736: “In the opinion of the Appeals Chamber, proof of active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior’s failure to prevent or punish those acts and may therefore aggravate the sentence. [A]ctive abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority: ‘The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance or in mitigation of his guilt.’”

Deronjic, (Trial Chamber), March 30, 2004, para. 202: “It has been endorsed by the Appeals Chamber in *Kupreskic et al.* that a commander’s participation in the attack that he himself ordered and planned can aggravate his criminal liability.”

Obrenovic, (Trial Chamber), December 10, 2003, para. 100: “When commanders, through their own actions or inactions, fail in the duty, which stems from their position, training, and leadership skills, to set an example for their troops that would promote the principles underlying the laws and customs of war and thereby – either tacitly or implicitly – promote or encourage the commission of crimes, this may be seen as an aggravating circumstance. The Trial Chamber finds that such is not the case with regards to Dragan Obrenovic.”

Krstic, (Trial Chamber), August 2, 2001, para. 708: “Direct criminal participation under Article 7(1), if linked to a high-rank position of command, may be invoked as an aggravating factor. [B]oth Tribunals have mentioned the three most direct forms of participation, ‘planning, ordering, instigating,’ as possible aggravating circumstances. So it is in the case of genocide. Because an accused can commit genocide without the aid and co-operation of others, provided he has the requisite intent, a one-man genocidal agent could be viewed differently from the commander of an army or the president of a State, who has enlisted the resources of an army or a nation to carry out his genocidal effort.”

See also Blaskic, (Trial Chamber), March 3, 2000, paras. 790-791: “Active and direct participation in the crime means that the accused committed by his own hand all or some of the crimes with which he is charged. Direct participation in the crime is accordingly an aggravating circumstance which will more often than not be held against the actual perpetrators rather than against the commanders.” “[C]ommand position is more of an aggravating circumstance than direct participation.”

(i) application—active, direct or personal participation, particularly of commander

Kupreskic et al., (Appeals Chamber), October 23, 2001, para. 454: “Santic seems to allege that the Trial Chamber erred in taking into account, as aggravating factors, his very participation in the attack on the home of Musafir Pusic. The Appeals Chamber disagrees. At this point in the Trial Judgement, the Trial Chamber was entitled to recall the matters for which Santic had been convicted in order to set out the basis on which it intended to impose sentence, based on its ‘overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime,’ the Appeals Chamber can find no error. Similarly, the Appeals Chamber can find no error in the Trial Chamber’s reference to the role that Santic played in the killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmici-Santici region. It is clear from the passage cited above that the Trial Chamber qualified this statement by reference to Santic’s participation in the attack on the Pusic house. Moreover, the Trial Chamber was entitled to take into account the fact that Santic’s participation in the Pusic attack took place in the context of the wider attack on Ahmici in which many Bosnian Muslim civilians were killed and injured and many houses were destroyed. For these reasons, this argument is rejected.” See also *Kupreskic et al.*, (Trial Chamber), January 14, 2000, para. 862 (discussing Santic’s role).

Deronjic, (Trial Chamber), March 30, 2004, para. 202: “The Trial Chamber considers the fact that the Accused personally planned and ordered . . . the attack [on Glogova] to be an additional aggravating factor.” See also *Deronjic*, (Trial Chamber), March 30, 2004, para. 189 (“the Accused personally participated in organising a weapon delivery to Serbs in Bratunac”); *Deronjic*, (Trial Chamber), March 30, 2004, para. 190 (the accused “actively participated in achieving the objective to transform the Municipality of Bratunac into a Serb ethnic territory”).

Stakic, (Trial Chamber), July 31, 2003, para. 914: “The Trial Chamber regards the fact that Dr. Stakic has been found responsible for planning and ordering, in addition to committing, the crime of deportation as a second aggravating factor”

(i) role as fellow perpetrator

Furundzija, (Trial Chamber), December 10, 1998, para. 281: Under the heading “Aggravating Circumstances”: “[T]he accused’s role in the tortures was that of fellow perpetrator. His function was to interrogate Witness A in the large room and later in the pantry where he also interrogated Witness D, while both were being tortured by Accused B. In such situations, the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering.”

**(j) discriminatory state of mind/ ethnic and religious
discrimination**

Blaskić, (Appeals Chamber), July 29, 2004, para. 695: “The Appeals Chamber considers that the Trial Chamber in the instant case was entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence of any conviction which included that discrimination as an element of the crime of which he was convicted.”

Vasiljević, (Appeals Chamber), February 25, 2004, para. 172. “The first issue is whether discriminatory intent can be used as an aggravating factor. To that question the answer is in the affirmative. The Appeals Chamber has already held in the *Kunarac* Appeals Judgement that

it is alleged that the Trial Chamber erred in regarding the discriminatory objective as an aggravating factor, as this constitutes an element of Article 5 crimes. In this context, the Appeals Chamber recalls the *Tadić* Appeal Judgement, which states that a discriminatory intent ‘is an indispensable legal ingredient of the offence only with regards to those crimes for which this is expressly required, that is, for Article 5(h) of the Statute, concerning various types of persecution.’ It is not an element for other offences enumerated in Article 5 of the Statute.

The Prosecution submitted and the Appeals Chamber agrees that “[t]here is a sound reason why the Trial Chamber mentioned discriminatory intent as an aggravating factor for the war crime of murder despite the fact that it cannot aggravate the global sentence. The reason is that every conviction should stand on its own. Consequently, aggravating circumstances must be considered for every crime separately. As discriminatory intent is an aggravating circumstance for the war crime of murder the Trial Chamber had to regard this fact.” See also *Kunarac, Kovac, and Vuković*, (Appeals Chamber), June 12, 2002, para. 357 (quoted language).

Vasiljević, (Trial Chamber), November 29, 2002, paras. 277-278: “[A] discriminatory state of mind goes to the seriousness of the offence [of persecution], but it may not additionally aggravate that offence. A discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element . . . [T]he existence of such a state of mind is relevant to the sentence to be imposed either as an ingredient of that crime or as a matter of aggravation where it is not such an ingredient.”

Blaskić, (Trial Chamber), March 3, 2000, para. 785: “The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant. Case-law has borne in mind the following motives: ethnic and religious persecution, desire for revenge and sadism.”

For cases discussing the inappropriateness of considering ethnic and religious discrimination or discriminatory intent as an aggravating factor where that would overlap with the elements of the crime of persecution as a crime against humanity, see “application—overlap of aggravating factor and element of crime,” “ethnic and religious discrimination/ discriminatory intent,” Section (IX)(c)(iv)(2)(a)(i)(c), ICTY Digest.

**(i) application—discriminatory state of mind/
ethnic and religious discrimination**

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 173: “The Appeals Chamber finds that the Trial Chamber did not err in holding that ‘a discriminatory state of mind may . . . be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element.’ A discriminatory state of mind is not an element of the crime of murder under Article 3 of the Statute and was not therefore taken into account in convicting the Appellant for the crime of murder. It could however be taken into account in estimating the gravity of the murder. This is the way the Trial Chamber used it. The discriminatory state of mind was used once in order to assess the gravity of the crime of murder and, of course on another occasion, in order to establish that the Appellant had the requisite discriminatory intent of the crime of persecution. The Trial Chamber committed no error in holding that a discriminatory state of mind can be regarded as an aggravating factor in relation to the crime of murder.”

Blaskic, (Trial Chamber), March 3, 2000, para. 785: “Here, the Trial Chamber takes note of the ethnic and religious discrimination which the victims suffered. In consequence, the violations are to be analysed as persecution which, in itself, justifies a more severe penalty.”

(k) verbal abuse of victims

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 161: “Verbal abuse has not been used previously at the International Tribunal as an aggravating factor. The Statute and the Rules provide the Trial Chambers with a wide of discretion in determining the sentence and in considering factors in aggravation. In the view of the Appeals Chamber, verbal abuse can be taken into account as an aggravating factor by Trial Chambers.”

(i) application—verbal abuse of victims

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 162: “As to the issue of whether verbal abuse by one of the members of the Milan Lukic group [a Serb para-military group, with a reputation for being particularly violent, led by Milan Lukic] may aggravate the Appellant’s sentence, the Appeals Chamber finds that, regardless of who made it, verbal abuse [where there was a joint criminal enterprise] aggravated the gravity of the crimes committed on the bank of the Drina River. The Appellant took part in these

crimes and the Trial Chamber correctly found that verbal abuse made in these circumstances amounted to an aggravating factor.”

(l) premeditation

Brđjanin, (Trial Chamber), September 1, 2004, para. 1109: “The Trial Chamber agrees with the jurisprudence of this Tribunal that a crime is aggravated if it was committed with premeditation . . .”

Krstić, (Trial Chamber), August 2, 2001, para. 711: “Premeditation may ‘constitute an aggravating circumstance when it is particularly flagrant’ and motive ‘to some extent [is] a necessary factor in the determination of sentence after guilt has been established.’ When a genocide or a war crime, neither of which requires the element of premeditation, are in fact planned in advance, premeditation may constitute an aggravating circumstance. Premeditated or enthusiastic participation in a criminal act necessarily reveals a higher level of criminality on the part of the participant. In determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm.”

Blaskić, (Trial Chamber), March 3, 2000, para. 793: “The premeditation of an accused in a crime tends to aggravate his degree of responsibility in its perpetration and subsequently increases his sentence.”

(i) application—premeditation

See Krstić, (Appeals Chamber), April 19, 2004, paras. 256, 257, 259 (finding a lack of premeditation).

(m) informed, voluntary, willing, enthusiastic or zealous participation in crime

Brđjanin, (Trial Chamber), September 1, 2004, para. 1109: “The Trial Chamber agrees with the jurisprudence of this Tribunal that a crime is aggravated if it was committed with . . . zeal.”

Blaskić, (Trial Chamber), March 3, 2000, para. 792: “Informed and voluntary participation means that the accused participated in the crimes fully aware of the facts. The importance of this factor varies in case-law depending on the degree of enthusiasm with which the accused participated. Informed participation is consequently a less aggravating circumstance than willing participation. Not only does the accused’s awareness of the criminality of his acts and their consequences and of the criminal behaviour of his subordinates count but also his willingness and intent to commit them.

Once such intent is established, it is likely to justify an additional aggravation of the sentence.”

**(i) application—~~informed~~, voluntary, willing,
enthusiastic or zealous participation in crime**

Tadic, (Trial Chamber), November 11, 1999, para. 19: “Each of the offences was committed in circumstances that could not but aggravate the crimes and the suffering of its victims. The horrific conditions at the camps established by Bosnian Serb authorities in [O]stina Prijedor and the inhuman treatment of the detainees in the [O]marska, Keraterm and Trnopolje camps] camps, of which Dusko Tadic was well aware, were discussed in detail Dusko Tadic’s willing participation in the brutal treatment exacerbated these conditions and serves only to increase the harm which he inflicted on his victims and accordingly to aggravate the crimes of which he has been found guilty.”

**(n) egregious nature of how crime was committed/ cruelty
and depravity**

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 28: “The apparent enjoyment an accused may derive from his criminal act has already been considered as an aggravating factor by the International Tribunal. In the *Čelebići* [a/k/a *Delalić*] Trial Judgement, the Trial Chamber found the following:

Hazim Delic is also guilty of inhuman and cruel treatment through his use of an electrical shock device on detainees. The shocks emitted by this device caused pain, burns, convulsions and scaring and frightened the victims and other prisoners. The most disturbing, serious and thus, an aggravating aspect of these acts, is that Mr. Delic apparently enjoyed using this device upon his helpless victims. He treated the device like a toy. He found its use funny and laughed when his victims begged him to stop. There is little this Trial Chamber can add by way of comment to this attitude, as its depravity speaks for itself.”

(emphasis in *Nikolic - Dragan*)

Blaskic, (Trial Chamber), March 3, 2000, para. 783: “The fact that the crime [ordering persecutions] was as egregious as it was is a qualitative criterion which can be gleaned from its particularly cruel or humiliating nature.” “The cruelty of the attack [persecutions against the Muslim civilians of Bosnia, in the municipalities of Vitez, Busovaca and Kiseljak and, in particular, in the towns and villages of Ahmici, Nadioci, Pirici, Santici, Ocehnici, Vitez, Stari Vitez, Donja Veceriska, Gacice, Loncari, Grbavica, Behrici, Kazagici, Svinjarevo, Gomionica, Gromiljak, Polje Visnjica, Visnjica, Rotilj, Hercezi, Tulica and Han Ploca/Grahovci between May 1, 1992 and January 31, 1994] is clearly a significant consideration when determining the proper sentence. In this case, the heinousness of the crimes is established by the sheer scale and planning of the

crimes committed which resulted in suffering being intentionally inflicted upon the . . . victims regardless of age, sex or status.”

**(i) application—egregious nature of how crime
was committed/ cruelty and depravity**

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, paras. 29-30, 40: “Contrary to the Appellant’s submission, there was clear evidence before the Trial Chamber that [the Appellant] did enjoy exercising his power over detainees through the depraved acts already described.” “The Appeals Chamber finds that the Trial Chamber did not commit any discernible error in concluding that the Appellant ‘apparently enjoyed his criminal acts.’” “[I]t was reasonable to conclude, on the basis of the evidence before it, that ‘due to [their] seriousness and particular viciousness,’ the beatings underlying the crime of torture amounted to the ‘highest level of torture’ as an aggravating factor.” “[T]he Trial Chamber correctly concluded that the gravity of the beatings was to be taken into account as an aggravating factor in assessing the Appellant’s criminality for acts of torture”

Cesic, (Trial Chamber), March 11, 2004, para. 51: “Most murders to which Ranko Cesic pleaded guilty were carried out in cold-blood. Two murders were preceded by beatings, and one detainee was forced to say goodbye and shake hands with the other detainees before he was taken out and executed. The cruelty and depravity shown by such behaviour are considered aggravating factors by the Trial Chamber.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 186-189, 192, 213: “The manner in which the crimes [at the Susica camp] were committed is an important consideration in assessing the gravity of the offence. This Trial Chamber finds it hard to imagine how murder, torture and sexual violence could be committed in a harsher and more brutal way than employed by the Accused, assisted by others.” “Not one single day and night at the camp passed by without Dragan Nikolic and other co-perpetrators committing barbarous acts. He played with the emotions of the inmates and tortured them with his words. After guards had beaten a detainee, the Accused exclaimed: ‘What? They did not beat you enough; if it had been me, you would not be able to walk,’ and: ‘I can’t believe how an animal like this can’t die; he must have two hearts.’” “On another occasion he took a detainee to men who were not camp guards. The Accused was heard saying to the men words to the effect: ‘Here, I brought you something for dinner.’”

“The Accused brutally and sadistically beat the detainees. He would kick and punch detainees and use weapons such as iron bars, axe handles, rifle butts, metal ‘knuckles,’ truncheons, rubber tubing with lead inside, lengths of wood and wooden bars to beat the detainees. The Accused even ignored his brother who would often plead with him to stop his criminal conduct” “One of the most chilling aspects of the Accused’s behaviour was the enjoyment he derived from his acts. . . . When two of the victims passed out due to a beating, the Accused and other guards had buckets of water

thrown on them to revive them. When detainees who were being beaten begged to be shot, the Accused would reply: *‘A bullet is too expensive to be spent on a Muslim.’*”

... “The Accused abused his power especially *vis à vis* the female detainees in subjecting them to humiliating conditions in which they were emotionally, verbally and physically assaulted and forced to fulfil the Accused’s personal whims, *inter alia*, washing and putting cream on his feet for his personal refreshment or having to relieve themselves in front of everybody else in the hangar.” (emphasis in original)

See also Vasiljevic, (Appeals Chamber), February 25, 2004, para. 157: “The Appeals Chamber notes that the method and circumstances surrounding a killing are factors which normally would be taken into account in a Trial Chamber’s consideration of the ‘inherent gravity’ of the offence. In the present case, it was considered as an aggravating factor. The Appeals Chamber holds that the Trial Chamber did not err in doing so.”

(o) sexual, violent and humiliating nature of the acts

Cesic, (Trial Chamber), March 11, 2004, para. 53: “The *Celebici* [a/k/a *Delalić*] Trial Judgement found that exacerbated humiliation and degradation, depravity and sadistic behaviour are aggravating factors. In particular, it found that rape committed in the presence of others exacerbated the victim’s humiliation.”

(i) application—sexual, violent and humiliating nature of the acts

Cesic, (Trial Chamber), March 11, 2004, para. 54: Applied to this case, the Trial Chamber finds that the humiliation suffered by the victims was exacerbated both because they were brothers [forced to perform sexual acts upon each other] and because guards were present, watching and laughing. . . . “[However,] the Trial Chamber will not consider exacerbated humiliation twice, *i.e.* once as an element of a violation of the laws or customs of war and once as an aggravating factor in the context of the conviction for a crime against humanity. Rather, it will only impose one single sentence and eventually consider the degree of humiliation only once in the final evaluation.”

Simic - Milan, (Trial Chamber), October 17, 2002, para. 63: “Although the mistreatment inflicted by Milan Simic upon his victims did not happen over a prolonged period of time, the manner and methods used render them despicable. The sexual, violent, and humiliating, nature of the acts are therefore considered in aggravation, as it would certainly have increased the mental suffering and feeling of degradation experienced by the victims.”

Furundžija, (Trial Chamber), December 10, 1998, paras. 282, 283: “The circumstances of these attacks [rapes and serious sexual assaults] were particularly horrifying. A woman was brought into detention, kept naked and helpless before her interrogators and treated

with the utmost cruelty and barbarity. [I]his case presents particularly vicious instances of torture and rape.”

(p) vulnerability of victims

Deronjić, (Appeals Chamber), July 20, 2005, para. 124: Vulnerability and defenselessness of victims can be an aggravating factor despite the statement in the *Kunarac et al.* Trial Judgment: “Only those circumstances directly related to the commission of the offence charged *and* to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation.” “Holding an individual responsible for taking advantage of the vulnerability of his victims . . . falls well within this notion of individual responsibility.” (emphasis in original)

Brđjanin, (Trial Chamber), September 1, 2004, para. 1104: “The Trial Chamber accepts that the status and vulnerability of the victims can be considered as aggravating circumstances.”

Nikolić - Dragan, (Trial Chamber), December 18, 2003, para. 184: “The Trial Chamber in *Banović* accepted that ‘the position of inferiority and the vulnerability of the victims as well as the context in which the offences were committed are relevant factors in assessing the gravity of the crime.’”

(i) application—vulnerability of the victims

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1088: The Appeals Chamber considered as an aggravating circumstance the “fact that among the victims of these offences were young and elderly people and women.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 844: “The Trial Chamber takes particular note of the vulnerability of the victims, who included women, children and elderly, as well as captured and wounded men. These victims were all in a position of helplessness and were subject to cruel treatment at the hands of their captors. In this situation, the Trial Chamber finds this to be an aggravating circumstance.”

Mrdja, (Trial Chamber), March 31, 2004, para. 48: “The Trial Chamber accepts that a considerable number of victims were in a situation of special vulnerability and finds this to be an aggravating factor in sentencing.”

Deronjić, (Trial Chamber), March 30, 2004, paras. 207-209, 198: “The Trial Chamber recognises that the inhabitants of Glogova were subjected to a position of special vulnerability.” “Prior to the attack, the village of Glogova had been deliberately disarmed, rendering the Muslim residents vulnerable and defenceless. Subsequently, the unarmed population offered no resistance against the attacking forces.” “Moreover, at the end of April 1992, the villagers of Glogova had been told that they would not be

attacked because they had turned over their weapons. . . . The given assertion created the false feeling of safety to the Muslim population and made them stay in Glogova. Without this presentation, in fact amounting to an ambush, in all likelihood far more of them might have fled in time. The Trial Chamber finds that this has to be considered in aggravation of the sentence.” “[T]he fact that the population of Glogova was disarmed well before the attack and offered no resistance during the attack aggravates the crime.” See also *Deronjic*, (Appeals Chamber), July 20, 2005, paras. 82-86 (no error in Trial Chamber’s concluding the inhabitants of Glogova were subject to a position of special vulnerability).

Cesic, (Trial Chamber), March 11, 2004, paras. 49, 108: “[T]he vulnerability of the victims] as detainees in the particular circumstances of the case, is considered an aggravating factor.” “The Trial Chamber . . . took into account the fact that the victims, being all detainees placed under the oversight of Bosnian Serb soldiers and/or policemen, were particularly vulnerable.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 184, 185, 213: “The Trial Chamber recognises that the victims were subjected to a position of special vulnerability. They were illegally detained in [the] Susica camp without any contact to outsiders which could substantially assist them. In the camp the detainees were guarded by men armed with machine guns, grenades, knives and other weapons. There were mothers and daughters, fathers and sons, the young (e.g. one detainee was only one year old), the infirm and the elderly, all detained together in the hangar at [the] Susica camp.” “The detainees were powerless and could not avoid daily humiliation, degradation or physical and mental abuse.” “The detainees [in *Nikolic*] were particularly vulnerable and treated rather as slaves than as inmates under the Accused’s supervision,” this was “especially aggravating.”

O'Brien, (Trial Chamber), December 10, 2003, para. 102: “The Trial Chamber takes particular note of the vulnerability of the victims. They were all in a position of helplessness and were subject to cruel treatment at the hands of their captors. In this situation, the Trial Chamber finds this to be an aggravating factor in the commission of the crimes.” See also *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 137 (similar).

Simic, Tadic and Zoric, (Trial Chamber), October 17, 2003, para. 1083: Under the heading “Aggravating circumstances”: “The Trial Chamber finds that the victims were in a position of acute vulnerability, being in the custody and control of the Bosanski Samac authorities: they all had been in detention for several months, in several detention places, and suffered extensive and brutal beatings at the hands of others; they were defenceless and had no possibility to protect themselves. In addition, most of the victims were personally known by Blagoje Simic.” See also *Simic, Tadic and Zoric*, (Trial Chamber), October 17, 2003, paras. 1094, 1107 (discussing vulnerability of victims).

Komarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 867: “[T]hat these offences were committed against particularly vulnerable and defenceless women and girls is also considered in aggravation.”

Blaskic, (Trial Chamber), March 3, 2000, para. 786: “The status of the victims may be taken into account as an aggravating circumstance. [I]n this case many crimes targeted the general civilian population and within that population the women and children” and “[t]hese acts constitute an aggravating circumstance.”

For cases discussing the inappropriateness of considering the vulnerability of the victims as an aggravating factor where that would overlap with an element of a crime, see “application—overlap of aggravating factor and element of crime,” “civilian status of the population or vulnerability of the victims,” Section (IX)(c)(iv)(2)(a)①(β), ICTY Digest.

(q) civilian status of the victims

(i) application—civilian status of the victims

Deronjic, (Appeals Chamber), July 20, 2005, para. 127: “[T]he civilian status of the population against which the attack is directed is an element of crimes against humanity and . . . therefore such status cannot be taken into account as an aggravating circumstance.”

Furundzija, (Trial Chamber), December 10, 1998, para. 283: “[T]he fact that Witness A was a civilian detainee [at the headquarters of the ‘Jokers,’ a special unit of the military police of the Croatian Defence Council (HVO)] and at the complete mercy of her captors [was found] to be a further aggravating circumstance.”

For cases discussing the inappropriateness of considering the civilian status of the population as an aggravating factor where that would overlap with an element of a crime, see “application—overlap of aggravating factor and element of crime,” “civilian status of the population/victims, or vulnerability of the victims,” Section (IX)(c)(iv)(2)(a)①(β), ICTY Digest.

(r) extraordinary suffering of victims

(i) application—extraordinary suffering of victims at Koricanske Stijene execution site

Mrdja, (Trial Chamber), March 31, 2004, paras. 55-56: “The Trial Chamber is convinced beyond a reasonable doubt that some of the victims, if not all [of the victims of the execution at Koricanske Stijene, where around 200 civilians were shot, all but 12 of whom were killed], were subjected to a level of suffering that went beyond what is usually suffered by victims of murder or inhumane acts. Once separated from the other

persons in the convoy, the men must have feared for their lives, and must have felt desperate when they were ordered to kneel down by the edge of the cliff or when they witnessed the execution of others. Those who survived only did so by desperately seeking to escape what must have seemed to be a certain death and subsequently faced suffering of an extreme nature.” “The Trial Chamber takes this extraordinary suffering into account as an aggravating factor.”

(s) victim impact/ long-term effect of crimes on surviving victims

Brđjanin, (Trial Chamber), September 1, 2004, para. 1105: “The extent of the long-term physical, psychological, and emotional suffering of the survivors can be an aggravating factor. The Appeals Chamber has held that even if the mental suffering of the survivors constitutes an element of, for example, the crime of inhumane acts, a Trial Chamber is entitled to take the long term effect of the trauma into account as an aggravating factor.”

Blaskić, (Trial Chamber), March 3, 2000, para. 787: “The physical and mental effects of the bodily harm meted out to the victims were also seen as aggravating circumstances.” “[V]ictims’ suffering is one factor to be taken into account when determining the sentence.”

(i) application—victim impact/ long-term effect of crimes on surviving victims

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 845: “While recognising that the serious bodily and mental harm inflicted on the victims is the basis upon which some of the convictions have been based, the Trial Chamber agrees that victim impact amounts to an aggravating circumstance in this case. The impact of the events of Srebrenica upon the lives of the families affected has created what is known as the ‘Srebrenica syndrome.’ The most stressful traumatic event for Srebrenica survivors is the disappearance of thousands of men, such that every woman suffered the loss of her husband, father, son or brother and many of the families still do not know the truth regarding the fate of their family members.”

Vasiljević, (Appeals Chamber), February 25, 2004, paras. 166, 167: “The Trial Chamber was satisfied that ‘the attempted murder of [two individuals] constitutes a serious attack on their human dignity, and that it caused [those individuals] immeasurable mental suffering.’ Considering the aggravating factors argued by the Prosecution, the Trial Chamber found that ‘the trauma still suffered by the survivors of the shooting’ constituted an aggravating factor.” “The Appeals Chamber is of the view that, even if the mental suffering of the survivors of the Drina River constitutes an element of the crime of inhumane acts, the Trial Chamber was entitled to take the long term effect of the trauma still suffered by [those two individuals] into account as an aggravating factor.”

Therefore, the Appellant has not demonstrated that the Trial Chamber erred in the exercise of its discretion.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 200-201: “The effects of [the] Susica [camp] did not end once a detainee left the camp. Many of the then detainees suffer to this day from the lasting not only physical effects of the treatment they received at the hands of the Accused or by his will.” “The emotional effects of Susica on the detainees are in some cases more permanent than the physical effects.”

Blaskic, (Trial Chamber), March 3, 2000, para. 787: “The Trial Chamber here points not only to the suffering inflicted upon the victims while the crimes were being committed through the use of indiscriminate, disproportionate and terrifying combat means and methods, such as ‘baby bombs,’ flame-throwers, grenades and a booby-trapped lorry, but also the manifest physical and mental suffering endured by the survivors of these brutal events. [A]long with the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day must also be mentioned.”

(t) unwillingness to assist individuals who sought assistance

Stakic, (Trial Chamber), July 31, 2003, para. 916: “The Trial Chamber considers Dr. Stakic’s unwillingness to assist certain individuals who approached him in times of need or indeed desperation to be an aggravating factor.”

(u) impact on victims’ families

Mrdja, (Trial Chamber), March 31, 2004, paras. 41-42: “The Trial Chamber is . . . of the view that, if the evidence adduced by the Prosecution shows a level of suffering which significantly exceeds what is usually suffered by the victims or their families (and already included in the general appreciation of murder or inhumane acts as serious crimes), it may be considered as an aggravating factor.” “[T]he Trial Chamber considers that the sentence should reflect all of the cruelty and inhumanity of Darko Mrdja’s direct participation in the shooting of around 200 civilians, of which all but 12 were killed, at Koricanske Stijene.”

(v) victims known to the accused

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 212: “The Trial Chamber agrees that under certain circumstances the knowledge of or even the friendship with a victim may amount to an aggravating factor.”

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1083: In evaluating aggravating circumstances, the Trial Chamber noted that “most of the victims were personally known by Blagoje Simic.”

(w) proving responsibility under both Article 7(1) and Article 7(3)

For discussion of the fact, where it is possible to convict under both Articles 7(1) and 7(3), the conviction should be entered under Article 7(1), and the fact that both types of responsibility were proven should be considered in sentencing, see Sections (IX)(b)(ix)(8)(b)-(c), ICTY Digest.

(x) youthful age of victims

Deronjic, (Appeals Chamber), July 20, 2005, para. 124: “The Appeals Chamber notes that it has often affirmed the use of aggravating factors related to victim characteristics such as age”

(i) application—youthful age of victims

Kunarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 864: “The youthful age of certain of the victims of the offences committed by Dragoljub Kunarac is considered as an aggravating factor.”

(y) extended time-period during which offenses were committed

Deronjic, (Appeals Chamber), July 20, 2005, para. 124: “The Appeals Chamber notes that it has often affirmed the use of aggravating factors related to victim characteristics such as . . . the length of time over which a crime is committed”

Kunarac, Kovac, and Vukovic, (Trial Chamber), February 22, 2001, para. 865: Another aggravating factor is that Kunarac “committed these offences [rape and enslavement] over an extended period of time [two months, with the victims held a total of six months] in relation to certain of his victims.”

Blaskic, (Trial Chamber), March 3, 2000, para. 784: “The number of victims must also be considered in relation to the length of time over which the crimes were perpetrated.”

(i) application—extended time-period during which offenses were committed

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1111-1112: “The Prosecution submits that the evidence establishes that the planning and preparation of the crimes committed [in the Autonomous Region of Krajina] started as early as mid 1991. The Prosecution submits that the long phase of and duration of the criminal conduct should be considered by the Trial Chamber as an aggravating factor.” “These underlying facts

have been proved beyond reasonable doubt and the Trial Chamber agrees that they amount to aggravating circumstances.”

(z) character of the accused

Delalić et al., (Appeals Chamber), February 20, 2001, para. 788: “The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges’ perception of an accused, have also been considered in both mitigation and aggravation of sentence. This behaviour is relevant to a Trial Chamber’s determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.”

(aa) accused not testifying is not an aggravating factor

Blaskić, (Appeals Chamber), July 29, 2004, para. 687: “Not included as an aggravating circumstance is the decision of an accused to make use of his right to remain silent. In this way, the consideration of aggravating circumstances differs from that of mitigating circumstances and reflects the different burden of proof for each.”

Delalić et al., (Appeals Chamber), February 20, 2001, para. 783: “[T]his absolute prohibition [against consideration of silence in the determination of guilt or innocence] must extend to an inference being drawn in the determination of sentence. [T]he Trial Chamber would have committed an error should it be shown that it relied on Mucić’s failure to give oral testimony as an aggravating factor in determining his sentence.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 729: “The exercise of the Accused of his right to remain silent, and not to testify, cannot constitute an aggravating circumstance.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 466 (same); *Plavšić*, (Trial Chamber), February 27, 2003, para. 64 (similar).

See also discussion of the “right to remain silent/ right against self-incrimination,” Section (X)(b)(ii), ICTY Digest.

(bb) the absence of a mitigating factor can never serve as an aggravating factor

Blaskić, (Appeals Chamber), July 29, 2004, para. 687: “[T]he absence of a mitigating factor can never serve as an aggravating factor.” *See also Stakić*, (Trial Chamber), July 31, 2003, para. 919 (similar).

Banović, (Trial Chamber), October 28, 2003, para. 61: “[A]s noted in *Plavšić*, it does not follow that failure to [cooperate] is an aggravating circumstance.” *See also Plavšić*, (Trial Chamber), February 27, 2003, para. 63 (similar).

**(i) application—the absence of a mitigating factor
can never serve as an aggravating factor**

Blaskić, (Appeals Chamber), July 29, 2004, para. 714: “The Appeals Chamber notes that a failure to enter a guilty plea cannot constitute an aggravating factor, although a guilty plea may conversely be considered as a mitigating factor. . . . On a plain reading of the relevant paragraphs of the Trial Judgement, the Appeals Chamber cannot conclude that the Trial Chamber in any way relied on or drew an adverse inference from the Appellant’s failure to plead guilty in deciding the Appellant’s sentence.”

(3) mitigating factors

(a) generally

**(i) mitigating circumstances include those not
directly related to the offense**

Brđjanin, (Trial Chamber), September 1, 2004, para. 1117: “Mitigating circumstances may . . . include those not directly related to the offence.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 729 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 466 (same as *Limaj*); *Đerović*, (Trial Chamber), March 30, 2004, para. 155 (same as *Brđjanin*); *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 145 (same as *Brđjanin*).

Stakić, (Trial Chamber), July 31, 2003, para. 920: “Mitigating circumstances may also include those not directly related to the offence such as co-operation with the Prosecutor or true expressions of remorse.”

**(ii) mitigating circumstances do not detract from
the gravity of the crime nor diminish
responsibility**

Bralo, (Trial Chamber), December 7, 2005, para. 42: “Mitigating circumstances may result in an adjustment of the sentence that would otherwise be imposed on a convicted person. The acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the degree of condemnation of his actions. Indeed, such circumstances may be unconnected with the commission of the crime itself, and can arise many months or years after the event.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1117: “The Trial Chamber emphasises that a finding of mitigating circumstances relates to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.”

(iii) list of some mitigating circumstances

Babić, (Appeals Chamber), July 18, 2005, para. 43: “Factors that have previously been taken into account by the International Tribunal as evidence in mitigation include: (1) co-operation with the Prosecution; (2) the admission of guilt or a guilty plea; (3) the expression of remorse; (4) voluntary surrender; (5) good character with no prior criminal convictions; (6) comportment in detention; (7) personal and family circumstances; (8) the character of the accused subsequent to the conflict; (9) duress and indirect participation; (10) diminished mental responsibility; (11) age; and (12) assistance to detainees or victims. Poor health is to be considered only in exceptional or rare cases. This list is not exhaustive and Trial Chambers are ‘endowed with a considerable degree of discretion in deciding on the factors which may be taken into account.’” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 696 (same list).

Đerongjić, (Trial Chamber), March 30, 2004, para. 156: “The Rules specify only ‘substantial co-operation with the Prosecutor’ as a mitigating factor, other factors often taken into account by this Tribunal in mitigating a sentence are, *inter alia*, a plea of guilty, acceptance of a certain degree of guilt, expression of genuine remorse, compassion by an accused and any assistance given to the victims by an accused, limited participation in alleged acts of violence, voluntary surrender, the age of the accused, absence of previous criminal record and the accused’s family and social situations.” *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 146 (similar list of factors).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1066: “A Trial Chamber has the discretion to consider any factors that it considers to be of a mitigating nature. Mitigating factors will vary with the circumstances of each case. In previous cases, Chambers of the Tribunal have found the following factors to be mitigating: voluntary surrender, guilty plea, co-operation with the Prosecution, youth, expression of remorse, good character with no prior criminal conviction, family circumstances, acts of assistance to victims, diminished mental capacity, and duress. Remorse has been considered as a mitigating factor in a number of cases before the Tribunal.”

See also Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 850 (listing voluntary surrender, good character, family circumstances, and remorse); *Babić*, (Trial Chamber), June 29, 2004, para. 48 (listing voluntary surrender and demonstrations of remorse); *Galić*, (Trial Chamber), December 5, 2003, para. 759 (listing voluntary surrender, remorse, and no history of violent behavior); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 126 (listing admission of guilt, co-operation with the Prosecutor, remorse, voluntary surrender, good character, comportment in the United Nations Detention Unit and family circumstances); *Banović*, (Trial Chamber), October 28, 2003, para. 62 (listing substantial co-operation, a guilty plea, remorse, good character with no prior criminal conviction); *Plavšić*, (Trial Chamber), February 27, 2003, para. 65

(listing voluntary surrender, a guilty plea, expression of remorse, good character with no prior criminal conviction, and the post-conflict conduct of the accused).

Regarding mitigating factors generally, see also “Trial Chamber obligated to take into account aggravating and mitigating factors,” “aggravating and mitigating factors not exhaustively defined,” “Trial Chamber determines which factors to count,” “Trial Chamber determines weight to give factors,” and “burden of proof,” Sections (IX)(c)(iv)(1)(a)-(e) and (IX)(c)(iv)(3), ICTY Digest.

(b) cooperation of the accused

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 66: “The weight to be attached to co-operation as a mitigating factor is within the discretion of Trial Chambers, which can decide, after assessing the importance to give to this factor, to give it no weight, to give it ‘substantial’ weight within the meaning of Rule 101(B)(ii), or to give it more ‘modest’ weight in mitigation.”

(i) substantial cooperation to be considered

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 88: “The Appeals Chamber acknowledges the obligation that Rule 101(B)(ii) of the Rules imposes upon Chambers to take account of the substantial cooperation with the Prosecution before or after conviction, in the determination of sentence.” See also *Krvicka et al.*, (Appeals Chamber), February 28, 2005, para. 722 (similar); *Bralo*, (Trial Chamber), December 7, 2005, para. 73 (similar); *Mrdja*, (Trial Chamber), March 31, 2004, para. 71 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 152 (similar); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 1067 (similar).

Blaskic, (Appeals Chamber), July 29, 2004, para. 701: “Rule 101(B)(ii) of the Rules permits the Trial Chamber to take into account ‘substantial co-operation with the Prosecutor’ as a mitigating factor.”

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 180: “Co-operation with the Prosecution is the only mitigating factor that Trial Chambers are specifically required to consider pursuant to Rule 101 (B)(ii) of the Rules.” See also *Banovic*, (Trial Chamber), October 28, 2003, para. 58 (similar).

Banovic, (Trial Chamber), October 28, 2003, para. 61: “The Trial Chamber observes that co-operation with the Prosecutor is generally considered in mitigation of sentence.”

(ii) determining whether cooperation is substantial

(a) determination to be made by Trial Chamber

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 722: “It is for the Trial Chamber to assess whether the co-operation of the defendant is substantial, and the conclusion of the Trial Chamber will only be disturbed if it made a discernible error thereby stepping outside the bounds of its discretion.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 156: “[I]t is for the Trial Chamber to make an assessment of the credibility of Momir Nikolic, which ultimately impacts upon the value of such co-operation.”

Jelusic, (Appeals Chamber), July 5, 2001, para. 126: “[I]he determination of whether the cooperation should be considered as substantial and therefore whether it constitutes a mitigating factor is for the Trial Chamber to determine.”

(b) evaluation of co-operation depends on quantity and quality of information provided

Brabo, (Trial Chamber), December 7, 2005, para. 76: “The Trial Chamber . . . agrees with the *Blaskic* Trial Chamber that ‘the evaluation of the accused’s co-operation depends both on the quantity and quality of the information he provides.’”

Deronjic, (Trial Chamber), March 30, 2004, para. 244: “The Trial Chamber reiterates the conclusions reached by another Trial Chamber in the recent sentencing judgement of Ranko Cesic, where it was held that ‘[t]he extent and quality of the information provided to the Prosecution are factors to take into account when determining whether the co-operation has been substantial.’” *See also Cesic*, (Trial Chamber), March 11, 2004, para. 62 (same language as quoted); *Banovic*, (Trial Chamber), October 28, 2003, para. 58 (similar); *Plavsic*, (Trial Chamber), February 27, 2003, para. 63 (similar).

Blaskic, (Trial Chamber), March 3, 2000, para. 774: “The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused’s co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Providing that the co-operation lent respects the aforesaid requirements, the Trial Chamber classes such co-operation as a ‘significant mitigating factor.’”

**(c) Trial Chamber may rely on Prosecution's
assessment of cooperation**

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 63: In assessing whether the Trial Chamber appropriately assessed the substantial nature of the Accused's cooperation, the Appeals Chamber held: "the Appeals Chamber does not see how the Trial Chamber failed to fulfil its obligation, pursuant to Rule 101(B)(ii) of the Rules, to consider co-operation with the Prosecution as a mitigating factor. The Appeals Chamber need not decide whether it would have been more appropriate for the Trial Chamber to request additional material before deciding on the matter. It suffices for the purpose of the present appeal that the Trial Chamber accepted that the Prosecution is satisfied that 'the Accused's co-operation until now was substantial.'"

Deronjic, (Trial Chamber), March 30, 2004, paras. 244, 245: "[T]he Trial Chamber [in the *Cesic* case], 'in the absence of any information to the contrary,' relied on the Prosecution's assessment of Cesic's degree of co-operation as well as on his commitment to testify if called by the Prosecution. It concluded that this substantial co-operation would be taken into account in determining the sentence." "The Trial Chamber in the present case follows a similar approach" "[T]aking all above mentioned factors into account, the Trial Chamber accepts the submissions of both Parties that the co-operation by the Accused was substantial and therefore regards it as a mitigating factor in determining the Accused's sentence."

**(d) lack of candor may impact on evaluation
of cooperation**

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 156: "Of primary importance to the Trial Chamber is the truthfulness and veracity of the testimony of Momir Nikolic in the *Blagojevic* Trial, as well as how forthcoming the information was. The Trial Chamber takes into consideration numerous instances where the testimony of Momir Nikolic was evasive and finds this to be an indication that his willingness to co-operate does not translate into being fully forthcoming in relation to all the events, given his position and knowledge. Further, the Trial Chamber has taken into consideration Tab 'B' to the Amended Plea Agreement, in which Momir Nikolic admitted that he previously made false statements, particularly that he ordered executions at Sandici and Kravica when in fact he had not. Had he been completely sincere about co-operating, Momir Nikolic would have been more open in all aspects of his testimony and been more forthright in his responses before, and to, the Trial Chamber. Additionally, while recognising that Mr. Nikolic was testifying about events which occurred over eight years ago, the Trial Chamber found that his testimony was not as detailed as it could have been in certain areas. This is an indicator of the character and a certain lack of candour on the part of Momir Nikolic, which the Trial Chamber has taken into consideration in its overall evaluation."

(e) that accused gains something does not preclude finding of substantial cooperation

Todorovic, (Trial Chamber), July 31, 2001, para. 86: “[T]he fact that an accused has gained or may gain something pursuant to an agreement with the Prosecution does not preclude the Trial Chamber from considering his substantial cooperation as a mitigating circumstance in sentencing.”

But see Blaskic, (Trial Chamber), March 3, 2000, para. 774: “[T]he Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return.”

(iii) cooperation that is less than substantial may be accorded modest weight

Vasiljevic, (Appeals Chamber), February 25, 2004, paras. 179-180: “The Appellant challenges the Trial Chamber’s finding that his co-operation with the Prosecution was not ‘substantial co-operation’ within the meaning of Rule 101(B)(ii) of the Rules and therefore was not considered as a mitigating factor.” “The Trial Chamber did not accept the Appellant’s co-operation with the Prosecution as substantial but it did accept his co-operation as modest and gave it some, albeit very little, weight in mitigation. The Appeals Chamber therefore finds that the Appellant has not shown a discernable error in the exercise of the Trial Chamber’s discretion.”

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 66: “The weight to be attached to co-operation as a mitigating factor is within the discretion of Trial Chambers, which can decide, after assessing the importance to give to this factor, to give it no weight, to give it ‘substantial’ weight within the meaning of Rule 101(B)(ii), or to give it more ‘modest’ weight in mitigation.”

Bralo, (Trial Chamber), December 7, 2005, para. 76: “The Trial Chamber concurs with the finding in the *Vasiljevic* Trial Judgement, which was upheld on appeal, that the amount of co-operation given by an accused need not be ‘substantial’ for it to be taken into account in the first place. In other words, the Trial Chamber can assess any purported co-operation given by Bralo to the Prosecution and determine its value and the weight to be given to it, if any, as a mitigating circumstance.”

(iv) error to consider cooperation by defense counsel

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 261-262: “In paragraph 520 of the Judgment, the Trial Chamber stated:

Finally, the Trial Chamber has given credit to the Accused for the extent to which his Counsel co-operated with it and with the Prosecution in the efficient conduct of the trial. Counsel were careful not to compromise their obligations to the Accused, but the restriction of the issues which they raised to those issues which were genuinely in dispute enabled the Trial Chamber to complete the trial in much less time than it would otherwise have taken.”

“The Appeals Chamber finds that the conduct described in that paragraph of the impugned Judgment is how any counsel should ordinarily behave before a Trial Chamber. The Appeals Chamber therefore considers that the Trial Chamber erred by giving credit to the Accused for his counsel’s conduct. In light of this error, the Appeals Chamber concludes that, as already stated, the conduct of counsel for Kmojelac must not be taken into account in deciding the sentence to be imposed in respect of the new convictions on appeal.”

(v) post-sentencing cooperation

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, paras. 84, 89: “Relying upon the *Kupreskic* Appeal Judgement, the Appellant requests the Appeals Chamber to consider, ‘in the interests of justice,’ ‘[his] substantial cooperation [...] after the date of the Sentencing Judgement as a factor in mitigation,’ namely his testimony as a Prosecution witness in the *Strugar* case.”

“The Trial Chamber in the present case considered the Appellant’s cooperation with the Prosecution as a factor in mitigation of his sentence, and qualified this cooperation as being of ‘exceptional importance.’ The Trial Chamber also took note of the Plea Agreement in this respect; it . . . expressly observed that the Appellant had agreed to cooperate with the Prosecution ‘whenever requested.’ During the Sentencing Hearing, the Trial Chamber learned of the – according to the Prosecution – significant evidence that the Appellant could provide in future trials and especially in the *Strugar* case. The Trial Chamber noted in the Sentencing Judgement that ‘the parties have made specific submissions to the Trial Chamber’ and referred to the portions of the Sentencing Hearing that confirmed the possible value of the Appellant’s testimony for other cases, as well as his willingness to testify in future cases. The Appeals Chamber thus concludes that the Trial Chamber was fully aware of the cooperation that the Appellant had provided and could provide in future cases, as realised later on in the *Strugar* case, and took this fact into account.”

Kupreskic, (Appeals Chamber), October 23, 2001, para. 463: “[T]he Appeals Chamber considers that, in appropriate cases, co-operation between conviction and appeal could be a factor that the Appeals Chamber too may consider in order to reduce sentence. This will of course depend on the circumstances of each case and the degree of co-operation rendered. In the present case, the interests of justice demand that this factor be taken into account.”

(vi) application—substantial cooperation⁶⁸

Babic, (Appeals Chamber), July 18, 2005, paras. 69-70, 74: Rejecting on appeal the argument that *Babic*'s cooperation "is not reflected in the [s]entence imposed": "the Trial Chamber did attach substantial weight to the Appellant's cooperation." "With regard to [Babic's] arguments pertaining to his cooperation, the Appeals Chamber has already found that the Trial Chamber properly took into account his status as a protected witness and the impact that his cooperation had on his family and accordingly gave 'substantial weight' to his cooperation." See also *Babic*, (Appeals Chamber), July 18, 2005, para. 45.

Blagjevic and Jokic, (Trial Chamber), January 17, 2005, para. 856: "The Trial Chamber finds that Dragan Jokic has co-operated with the Prosecution. He appeared for two interviews with the Prosecutor and voluntarily surrendered to the Authorities of this Tribunal. Accordingly, the Trial Chamber will take this into consideration as a mitigating factor."

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1136, 1137: "The Defence submits that the Accused (1) has been consistently respectful and attentive during these proceedings, recognising the gravity of the charges against him and the importance of the proceedings; (2) has consented to counsel's advice to forego cross-examination and challenges to the veracity of the victims of sexual assault; (3) the Accused has conducted himself in a manner beyond reproach regarding a particular Prosecution witness; and (4) has continuously showed respectful deportment despite upheavals over which he had no control." "It is . . . acknowledged that he readily agreed to [co-counsel's] temporary excusal from the courtroom. His submission in mitigation relating to his conduct regarding a particular Prosecution witness is also accepted. Only these arguments will be taken into consideration as mitigating factors."

Babic, (Trial Chamber), June 29, 2004, paras. 74-75: "The Trial Chamber takes note of the extensive cooperation given spontaneously by *Babic*, and, as the Prosecution puts it, 'at great danger to his family and his own personal safety.' *Babic* provided self-incriminatory statements and documentation to assist in bringing himself and others to justice. The extent of *Babic*'s cooperation with the Tribunal is established by the evidence adduced in this case, which consists among other things of portions of the transcripts of the interviews conducted between Prosecution investigators and *Babic*, and the transcript and related exhibits of *Babic*'s testimony in the *Mihseric* proceedings."

⁶⁸ It is possible that for some of the cases in this section that do not specify whether the cooperation was substantial or not, the cooperation was viewed as more modest; in that event, the case would more appropriately fall within the next section in this Digest. See "application—moderate cooperation," Section (IX)(c)(iv)(3)(b)(vii) below.

“The Trial Chamber will attach substantial mitigating weight to Babic’s cooperation with the Tribunal.”

Mrdja, (Trial Chamber), March 31, 2004, paras. 72-74: “[T]he Trial Chamber notes the Plea Agreement, pursuant to which Darko Mrdja agreed to cooperate with the Prosecution.” “The Trial Chamber takes also note of the fact that the Prosecution has acknowledged that Darko Mrdja has met his obligation of cooperation as set forth in the Plea Agreement.” “Based on the above, the Trial Chamber accepts the conclusions of the Prosecution that Darko Mrdja’s cooperation has been substantial. It will therefore be considered as a mitigating circumstance in the determination of the sentence.”

Deronjic, (Trial Chamber), March 30, 2004, paras. 246-255: The following were considered in concluding that the co-operation by the Accused was substantial: (i) the provision of unique and corroborative information to the Prosecution; (ii) the Accused’s testimony in other proceedings before the Tribunal; (iii) the provision of original documentation to the Prosecution; and (iv) the identification of new crimes and perpetrators unknown to the Prosecution. *But see Deronjic*, (Trial Chamber), Dissenting Opinion of Judge Schomburg, March 30, 2004, para. 15 (“The forensic value of [Deronjic’s] statements and testimonies is extremely limited, until the Accused is prepared to clarify which details are true and which are not.” “I can not attach any mitigating weight to such an unsound mixture of truth and lies, creating more confusion than assistance in the Tribunal’s search for the truth.”).

Jokic - Miodrag, (Trial Chamber), March 18, 2004, paras. 95-96: “The Trial Chamber takes note of the Plea Agreement with the Prosecution, pursuant to which Miodrag Jokic agreed to co-operate with the Prosecution and ‘to provide truthful and complete information’ to the Tribunal whenever requested. The Trial Chamber takes into account also the Prosecution’s acknowledgement that Miodrag Jokic has fully co-operated and that his cooperation has been substantial.” “The Trial Chamber finds that, when determining the sentence, this factor is to be considered as a mitigating circumstance.”

Cesic, (Trial Chamber), March 11, 2004, paras. 61-62: Where Ranko Cesic “provided a full and complete interview to the Prosecution concerning his knowledge of war crimes and other violations of international humanitarian law in and around Brcko during the armed conflict in Bosnia and Herzegovina” and “Ranko Cesic has agreed to testify in future proceedings before the Tribunal if called upon by the Prosecution to do so,” the Trial Chamber concluded “that his co-operation with the Prosecution has been substantial and will be taken into account in determining sentence.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 259-260: “[I]nformation provided by Dragan Nikolic will assist the Prosecutor of the ICTY and prosecutors of the yet to be established war crimes chambers in his home country. Furthermore, the Trial Chamber relies upon the Accused’s continued co-operation with the Prosecution

of the ICTY and of the home country. The latter fact no doubt has to have a substantial impact on the question of early release.” “Therefore, the Trial Chamber accepts that the Prosecution is satisfied that the Accused’s co-operation until now was substantial and considers this factor as being of some importance for mitigating the sentence, especially since the information about [the] Susica camp and Vlasenica municipality was heard for the first time before this Tribunal. Thus, the Accused has contributed and will contribute to the fact-finding mission of the Tribunal and the to be established war crimes chambers in his home country.”

Obrenovic, (Trial Chamber), December 10, 2003, paras. 128, 129: “The Trial Chamber notes that the Prosecution acknowledges full co-operation from Dragan Obrenovic. The Trial Chamber finds that Dragan Obrenovic provided truthful testimony and detailed information in the *Blagojevic* Trial regarding his knowledge of the events related to Srebrenica and the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/ Republika Srpska] military structure. The Trial Chamber agrees with the Prosecution that Dragan Obrenovic answered each question as clearly and precisely as he could, regardless of whether it was asked by the Prosecution, defence counsel or the Trial Chamber. The Trial Chamber further notes that he testified in the *Krstic* Appeal Proceedings and has further agreed to testify in other proceedings. In addition, he assisted the Prosecution by providing it with numerous documents relevant for the *Blagojevic* Trial and investigations in other cases. The Trial Chamber also finds that Dragan Obrenovic co-operated with the Prosecution during the investigation phase when he permitted the Prosecution to conduct a search of the Zvornik Brigade’s property.” “Therefore, the Trial Chamber finds substantial co-operation with the Prosecution in this case to be a significant mitigating circumstance.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 155: “The Office of the Prosecutor has submitted that Momir Nikolic was helpful and co-operative towards the Prosecution, meeting them whenever requested and providing valuable information regarding the events in and around Srebrenica. Further, he has provided the Prosecution with information regarding events in Eastern Bosnia, which is beyond what was agreed upon as part of the Amended Plea Agreement. The Prosecution has also submitted that information provided by Momir Nikolic has resulted in the positive identification of mass graves, which were previously unknown. The Trial Chamber takes these aspects into consideration, and particularly the closure which may now come to the surviving family members and friends due to the discovery of new mass graves. The Trial Chamber acknowledges that in the view of the Prosecution, Momir Nikolic has co-operated fully.”

Banovic, (Trial Chamber), October 28, 2003, para. 60: “The Defence observes that, given his low rank in the police authority, the Accused had necessarily limited access to sensitive information that may be of interest to the Prosecution. However, the Defence argues, there is no reason why the information that the Accused has provided, on the

basis of his knowledge, however limited, of events in Prijedor and at the Keraterm camp, should not qualify as 'substantial' co-operation. In the circumstances, the Trial Chamber is satisfied that the co-operation is substantial."

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, paras. 1101, 1090: "The Trial Chamber finds that the fact that Miroslav Tadic chose to testify on his own behalf a mitigating circumstance, although it would have been accorded more weight if he had chosen to do so earlier in the presentation of his case. The Trial Chamber agrees with the Defence submission that Miroslav Tadic demonstrated a cooperative attitude towards the Prosecution, by contacting the Office of the Prosecutor first, and by giving two interviews after his surrender, and finds that these factors are mitigating. The Trial Chamber further considers as a mitigating factor Miroslav Tadic's consent on 27 March 2002 that a new Judge be appointed pursuant to Rule 15bis." "The Trial Chamber considers as a mitigating factor Blagoje Simic's consent on 27 March 2002 that a new Judge be appointed pursuant to Rule 15bis. The fact that Blagoje Simic chose to testify at the beginning of the Defence case is taken into account as a mitigating factor."

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 1114: "The Trial Chamber accepts that Simo Zaric cooperated to a certain extent with the Office of the Prosecutor by accepting to undertake three interviews, after his surrender. The Trial Chamber considers as a mitigating factor Simo Zaric's consent on 27 March 2002 that a new Judge be appointed pursuant to Rule 15bis."

Stakic, (Trial Chamber), July 31, 2003, para. 921-922: "The Trial Chamber considers as a mitigating factor Dr. Stakic's consent on 1 October 2002 that a new Judge be appointed. Such consent was required at the time under all circumstances by Rule 15 bis. This allowed the proceedings to continue and averted the need to restart the Trial, which was both in the interests of justice and in the interests of the Accused." Additionally, "[t]he Trial Chamber considers as a mitigating factor Dr. Stakic's behaviour towards certain witnesses."

Simic - Milan, (Trial Chamber), October 17, 2002, para. 112: "The Trial Chamber finds Milan Simic's comportment in the Detention Unit and his general co-operation with the Trial Chamber and the Prosecution during the proceedings against him to be a mitigating factor."

Erdemovic, (Trial Chamber), March 5, 1998, paras. 16, 21: The Trial Chamber held that "the accused cooperated without asking for anything in return and that the extent and value of his cooperation has been such as to justify considerable mitigation." "It is in the interests of international criminal justice and the purposes of the International Tribunal to give appropriate weight to the cooperative attitude of the accused. [Erdemovic] truthfully confessed his involvement in the massacre at a time when no authority was seeking to prosecute him in connection therewith, knowing that he would

most probably face prosecution as a result. Understanding of the situation of those who surrender to the jurisdiction of the International Tribunal and who confess their guilt is important for encouraging other suspects or unknown perpetrators to come forward.”

(vii) application—moderate cooperation

Bralo, (Trial Chamber), December 7, 2005, paras. 78-81, 83: “In addition to the provision of documentary material, the Trial Chamber takes into consideration the professed willingness of Bralo to provide further information to the Prosecution in the form of some kind of deposition. It notes, however, that Bralo has refused to meet privately with the Prosecution for an interview, which is the normal procedure for the taking of information from an accused or convicted person, out of a fear that this would have consequences for his and his family’s safety. Whether or not these fears are justified, it remains the case that it is the function of the Prosecution to gather information and evidence for use in trials before the Tribunal, and it is not for a Trial Chamber to interfere in that evidence-gathering process.” “[F]or the purposes of assessing Bralo’s ‘substantial co-operation’ with the Prosecution, the Trial Chamber takes into account his willingness to be available to give some kind of deposition to the Prosecution, as discussed at the Sentencing Hearing.”

“The Trial Chamber finds . . . that [Bralo’s] willingness to give oral or written testimony in future cases has limited value, for it does not go beyond what is required of any individual who is called to give evidence to the Tribunal.”

“[W]ith regard to the use that may be made of the Factual Basis agreed between Bralo and the Prosecution, the Trial Chamber finds that this is also of limited value as evidence of co-operation from Bralo. While he has placed no restriction on the use of the Factual Basis, and therefore is not being obstructive, it does not necessarily follow that he is being positively co-operative with the Prosecution. Therefore, even if the Factual Basis is being used by the Prosecution in other cases before the Tribunal, its use does not imbue it with value as evidence of co-operation from Bralo.”

“In conclusion, the Trial Chamber finds that there is not evidence of ‘substantial’ co-operation from Bralo with the Prosecution. There is evidence of some co-operation, in the form of provision of documents and a willingness to give information, albeit in a prescribed format, and the Trial Chamber gives that appropriate weight as moderate co-operation.” “[T]he Trial Chamber gives little weight to [the accused’s co-operation with the Prosecution].”

Banovic, (Trial Chamber), October 28, 2003, para. 61: “In this case, the Trial Chamber notes, as conceded by the Prosecution itself, that the Accused agreed to be interviewed by the Prosecution thus demonstrating his willingness to co-operate. The fact that he did agree to be interviewed may in itself, in some cases, be a sign of co-operation, however modest. His commitment to co-operate further with the Prosecution in the future, under the conditions stipulated in the Plea Agreement, is also a factor that the Trial Chamber has taken into account in mitigation of sentence.”

(c) guilty plea

(i) a guilty plea is a mitigating factor

Babić, (Trial Chamber), June 29, 2004, para. 68: “The Trial Chamber accepts the parties’ arguments that the case-law of the Tribunal has consistently considered a guilty plea as a mitigating factor.”

Banović, (Trial Chamber), October 28, 2003, para. 68: “It is generally agreed that a guilty plea should, in principle, be considered as a factor in mitigation of sentence. This principle has been endorsed in several cases before the Tribunal.”

Blaskić, (Trial Chamber), March 3, 2000, para. 777: “A guilty plea, where entered, may in itself constitute a factor substantially mitigating the sentence.”

See also Banović, (Trial Chamber), October 28, 2003, para. 68: “[I]n *Todorović*, the Trial Chamber held that ‘a guilty plea should, in principle, give rise to a reduction in the sentence that the accused would otherwise have received.’” *See also Simić - Milan*, (Trial Chamber), October 17, 2002, para. 84 (same quoted language).

Compare Đeronjić, (Trial Chamber), Dissenting Opinion of Judge Schomburg, March 30, 2004, para. 14(b)-(c): “It becomes evident from the analysis, however, that in the majority of the countries under survey a guilty plea is given only little – if any – weight in relation to serious crimes.” “In the light of this analysis, and taking into consideration that a guilty plea can not derogate from the gravity of a crime, I believe that the guilty plea of Miroslav Đeronjić only warrants little weight in sentencing.”

(ii) a guilty plea is an acknowledgement of responsibility

Babić, (Trial Chamber), June 29, 2004, para. 46: “The Trial Chamber is of the opinion that when an accused pleads guilty, he takes an important step in this [rehabilitation] process. This acknowledgement is an indication of the determination of an accused to accept his responsibilities towards the aggrieved persons and society at large.” *See also Mrdija*, (Trial Chamber), March 31, 2004, para. 19 (similar); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, para. 36 (similar).

Đeronjić, (Trial Chamber), March 30, 2004, para. 134: “A guilty plea indicates that an accused is admitting the veracity of the charges contained in an indictment. This also means that the accused acknowledges responsibility for his actions. Undoubtedly this tends to further a process of reconciliation.” *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 121 (same).

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 232: “The Trial Chamber accepts that a guilty plea has to be taken into account for mitigation when considering an appropriate sentence since it reflects the accused’s acceptance of responsibility for his crimes.”

(iii) various benefits of a guilty plea

Mrdja, (Trial Chamber), March 31, 2004, para. 78: “The Trial Chamber notes that the case law of the Tribunal has commonly accepted a guilty plea as a circumstance in mitigation of sentence for the following reasons: a guilty plea may demonstrate honesty, helps to establish the truth, may contribute to peace-building and reconciliation, and saves the Tribunal the time and resources of a lengthy trial.”

Deronjic, (Trial Chamber), March 30, 2004, para. 234: “In the jurisprudence of the Tribunal and the ICTR, several reasons have been given for the mitigating effect of a guilty plea, such as the showing of remorse and repentance, the contribution to reconciliation and establishing the truth, the encouragement of other perpetrators to come forth, and the fact that witnesses are relieved from giving evidence in court.”

Jokic - Mudrag, (Trial Chamber), March 18, 2004, para. 76: “The jurisprudence of the Tribunal has accepted that a guilty plea may go to the mitigation of sentence because, according to the circumstances, it may: demonstrate repentance, honesty, and readiness to take responsibility; help establish the truth; contribute to peace and reconciliation; set an example to other persons guilty of committing crimes; relieve witnesses from giving evidence in court; and save the Tribunal’s time and resources.”

(iv) a guilty plea encourages others to come forth

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 56: “The Appeals Chamber notes that the Trial Chamber . . . did note that the encouragement of others to come forth can be considered as an element of the mitigating effect of a guilty plea. The Appellant has not shown that the Trial Chamber erred in the exercise of its discretion, and in fact acknowledges that the Trial Chamber . . . took into account the hope of the Appellant that others will assume their responsibility for their crimes.”

Banovic, (Trial Chamber), October 28, 2003, para. 68: “[I]n *Erdemovic*, the Trial Chamber held that ‘an admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth whether already indicted or unknown perpetrators.’” *See also Erdemovic*, (Trial Chamber), March 5, 1998, para. 16 (source of quoted language).

(v) victims and witnesses are relieved from testifying at trial

Bralo, (Trial Chamber), December 7, 2005, para. 64: “Substantial human and practical benefits flow from a plea of guilty, particularly one tendered at an early stage in the proceedings. Victims and witnesses who have already suffered enormous psychological and physical harm are not required to travel to the Hague to recount their experiences in court, and potentially re-live their trauma.”

Mrdja, (Trial Chamber), March 31, 2004, para. 78: One of the benefits of a guilty plea is that “victims and witnesses are relieved from the possible stress of testifying at trial.” *See also Banovic*, (Trial Chamber), October 28, 2003, para. 68 (same quoted language).

Deronjic, (Trial Chamber), March 30, 2004, para. 134: “A guilty plea protects victims from having to relive their experiences and re-open old wounds.” *See also Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 121 (same).

Cesic, (Trial Chamber), March 11, 2004, para. 58: “A guilty plea also saves the witnesses from the possible trauma of re-living the events when testifying in court.”

(vi) a guilty plea may provide a sense of relief to surviving victims and their relatives and friends

Cesic, (Trial Chamber), March 11, 2004, para. 58: “[A] guilty plea, whereby an accused recognises his/her responsibility and specifies the circumstances in which the crimes were committed, is likely to provide a sense of relief to the surviving victims and the victims’ relatives and friends.”

(vii) a guilty plea may contribute to establishing the truth and reconciliation in the affected communities

Deronjic, (Trial Chamber), March 30, 2004, para. 236: “The Trial Chamber finds that, in contrast to national legal systems where the reasons for mitigating a punishment on the basis of a guilty plea are of a more pragmatic nature, the rationale behind the mitigating effect of a guilty plea in this Tribunal is much broader, including the fact that the accused contributes to establishing the truth about the conflict in the former Yugoslavia and contributes to reconciliation in the affected communities. The Trial Chamber recalls that the Tribunal has the task to contribute to the ‘restoration and maintenance of peace’ and to ensure that serious violations of international humanitarian law are ‘halted and effectively redressed.’” *See also Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 233 (same).

Cesic, (Trial Chamber), March 11, 2004, paras. 27-28: “By rehabilitation, the Trial Chamber understands the need to take into account the rehabilitative potential of a convicted person; this will often go hand in hand with the process of reintegrating the convicted person into the society.” “The Trial Chamber is of the opinion that, when an accused pleads guilty, he or she takes an important step in the rehabilitation and reintegration processes. This acknowledgement is capable of contributing to the establishment of the truth; it forms an indication of the determination of an accused to face his or her responsibility towards the aggrieved party and society at large; it may contribute to reconciliation.”

Cesic, (Trial Chamber), March 11, 2004, para. 58: “The Trial Chamber accepts that the guilty plea helps to establish the truth and may aid the process of reconciliation in the Brcko municipality.”

Banovic, (Trial Chamber), October 28, 2003, para. 68: “Undoubtedly, a plea of guilty critically contributes to the Tribunal’s fundamental truth-finding mission.”

Todorovic, (Trial Chamber), July 31, 2001, para. 81: “A guilty plea is always important for the purpose of establishing the truth in relation to a crime.”

(viii) a guilty plea saves resources

Brabo, (Trial Chamber), December 7, 2005, para. 64: “[S]carce legal, judicial and financial resources that would otherwise be expended in preparing for and conducting a lengthy and expensive trial may be redeployed in the interests of securing the wider objectives of the Tribunal.”

Deronjic, (Trial Chamber), March 30, 2004, para. 134: “As a side-effect, albeit not really a significant mitigating factor, [a guilty plea] saves the Tribunal’s resources.” *See also Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 121 (same).

Deronjic, (Trial Chamber), March 30, 2004, para. 234: “Trial Chambers took into account that a guilty plea saves the Tribunal the ‘effort of a lengthy investigation and trial,’ and special importance was attached to the timing of the guilty plea.”

Banovic, (Trial Chamber), October 28, 2003, para. 68: “A guilty plea results in a public benefit when, as in this case, it is entered before the commencement of the trial as it saves the Tribunal the time and resources of a lengthy trial.”

Simic - Milan, (Trial Chamber), October 17, 2002, para. 84: “A guilty plea is recognised as greatly contributing to the work of the Tribunal in so far that it avoids a possible lengthy trial. . . . [A] plea of guilt will only contribute to public advantage if it is pleaded before the commencement of the trial. Such public advantage includes the saving of resources for investigation, counsel fees and the general cost of trial.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 16: “[T]his voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.”

**(ix) avoidance of a lengthy trial/saving resources
should not be given undue weight**

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 51: “The avoidance of a lengthy trial has been commended, as correctly noted by the Trial Chamber, with the first admission of guilt before the International Tribunal, in the *Erdemovic* Sentencing Judgement:

[T]his voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.

... Following *Erdemovic*, other Trial Chambers have also noted that a guilty plea before the commencement of the trial contributes to saving International Tribunal resources. Nevertheless, the Appeals Chamber emphasises that it considers that the avoidance of a lengthy trial, while an element to take into account in sentencing, should not be given undue weight.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 67, 151: “The Trial Chamber notes that the savings of time and resources due to a guilty plea has often been considered as a valuable and justifiable reason for the promotion of guilty pleas. This Trial Chamber cannot fully endorse this argument. While it appreciates this saving of Tribunal resources, the Trial Chamber finds that in cases of this magnitude, where the Tribunal has been entrusted by the United Nations Security Council – and by extension, the international community as a whole – to bring justice to the former Yugoslavia through criminal proceedings that are fair, in accordance with international human rights standards, and accord due regard to the rights of the accused and the interests of victims, the saving of resources cannot be given undue consideration or importance. The *quality* of the justice and the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised. Unlike national criminal justice systems, which often must turn to plea agreements as a means to cope with heavy and seemingly endless caseloads, the Tribunal has a fixed mandate. Its very *raison d’être* is to have criminal proceedings, such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal conduct – not simply a portion thereof. Thus, while savings of time and resources may be a *result* of guilty pleas, this consideration should not be the main *reason* for promoting guilty pleas through plea agreements.”

“[T]he Trial Chamber takes note of the fact that other accused have been given credit for pleading guilty before the start of trial or at an early stage of the trial because of the savings of Tribunal resources. Both parties have made submissions that this aspect of a guilty plea should be considered as a mitigating factor [T]he Trial

Chamber will allocate little weight to this aspect of the benefits of a guilty plea.” (emphasis in original)

Compare Mrdja, (Trial Chamber), March 31, 2004, para. 78: “[A] guilty plea . . . saves the Tribunal the time and resources of a lengthy trial.” See also *Deronjić*, (Trial Chamber), March 30, 2004, para. 234 (“a guilty plea saves the Tribunal the ‘effort of a lengthy investigation and trial’”); *Jokić - Miodrag*, (Trial Chamber), March 18, 2004, para. 77 (Miodrag Jokić’s plea saves considerable time and resources for the Tribunal”); *Plavšić*, (Trial Chamber), February 27, 2003, para. 73 (considering “the substantial saving of international time and resources as a result of a plea of guilty before trial”); *Simić - Milan*, (Trial Chamber), October 17, 2002, para. 85 (“public advantage [of a guilty plea] includes the saving of resources for investigation, counsel fees and the general cost of trial.”).

(x) guilty plea does not realize certain aims of having a public trial, does not give the victims or survivors an opportunity to have their voices heard, and may create a gap in the historical record

Nikolić - Dragan, (Trial Chamber), December 18, 2003, para. 122: “As opposed to a pure guilty plea (Rule 62 *bis* of the Rules), a plea agreement (Rule 62 *ter* of the Rules), while having its own merits as an incentive to plead guilty, has two negative side effects. First, the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis. Second, it may be thought that an accused is confessing only because of the principle ‘*do ut des*’ (give and take). Therefore, the reason why an accused entered a plea of guilt need to be analysed: were charges withdrawn, or was a sentence recommendation given? In any event, a plea agreement pursuant to Rule 62 *ter* and 62 *bis* of the Rules does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to the people of the former Yugoslavia. Neither the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement. This might create an unfortunate gap in the public and historical record of the concrete case, although, when coupled with an accused’s substantial co-operation with the prosecution, an agreement grants more insights into previously undiscovered areas. However, while treating plea agreements with appropriate caution, it should be recalled that this Tribunal is not the final arbiter of historical facts. That is for historians. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done.” See also *Deronjić*, (Trial Chamber), March 30, 2004, para. 135 (same).

Nikolić - Momir, (Trial Chamber), December 2, 2003, paras. 61-63, 73: “When convictions result from a guilty plea, certain aims of having criminal proceedings are not fully realised, most notably a public trial.” “Furthermore, at a trial, victims or survivors

of victims have an opportunity to have their voices heard as part of the criminal justice process. It is rare that victims will be called as witnesses as part of a plea agreement, though witnesses may be called at the sentencing hearing.”

“Most concerning to this Trial Chamber is that as a result of the negotiations entered into by the Prosecutor and defence, the final plea agreement may include provisions such that the Prosecutor withdraws certain charges or certain factual allegations. The Prosecutor may do so for a variety of reasons. In cases where factual allegations are withdrawn, the public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a ‘bargaining chip’ in the negotiation process.”

“The Trial Chamber finds that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal. The Trial Chamber further finds, however, that based on the duties incumbent on the Prosecutor and the Trial Chambers pursuant to the Statute of the Tribunal, the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice.”

For discussion of “concerns regarding plea agreements in cases involving serious violations of international humanitarian law,” see Section (X)(f)(xiv), ICTY Digest.

(xi) pleading guilty “early”

Bralo, (Trial Chamber), December 7, 2005, para. 64: “The entering of a guilty plea prior to trial, to charges of the seriousness of those contained in the Indictment, is a significant step for an accused person to take. Substantial human and practical benefits flow from a plea of guilty, particularly one tendered at an early stage in the proceedings.”

Deronjic, (Trial Chamber), March 30, 2004, para. 231: “In considering the reduction of a sentence, the relevant factor is the stage of proceedings at which the offender pleads guilty and the circumstances in which the plea is tendered.”

Cesic, (Trial Chamber), March 11, 2004, para. 59: “In this case, the plea was entered some sixteen months after the initial appearance of the Accused, but nevertheless still before the commencement of trial, thereby saving time, effort and resources. The jurisprudence of the Tribunal has accepted that this factor counts in mitigation of punishment.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 151: “[T]he Trial Chamber takes note of the fact that other accused have been given credit for pleading guilty before the start of trial or at an early stage of the trial because of the savings of Tribunal resources.”

Simic - Milan, (Trial Chamber), October 17, 2002, para. 84: “[A] plea of guilt will only contribute to public advantage if it is pleaded before the commencement of the trial.”

Sikirica et al., (Trial Chamber), November 13, 2001, para. 150: “[W]hile an accused who pleads guilty to the charges against him prior to the commencement of his trial will usually receive full credit for that plea, one who enters a plea of guilt any time thereafter will still stand to receive some credit, though not as much as he would have, had the plea been made prior to the commencement of the trial.”

Compare Obrenovic, (Trial Chamber), December 10, 2003, para. 118: “[T]he Trial Chamber notes that other accused have been given credit for pleading guilty before the start of trial or at an early stage of the trial because of the savings of Tribunal resources. Both parties have made submissions that this aspect of a guilty plea should be considered as a mitigating factor. Recalling its finding in the *Nikolic* Sentencing Judgement, the Trial Chamber will allocate little weight to this aspect of the benefits of a guilty plea.”

(xii) “lateness” of guilty plea

Deronjic, (Trial Chamber), March 30, 2004, para. 231: “In considering the reduction of a sentence, the relevant factor is the stage of proceedings at which the offender pleads guilty and the circumstances in which the plea is tendered.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 234: “Having been arrested in 2000, Dragan Nikolic pleaded guilty only after three years of detention and just prior to the hearing of the testimonies by six deposition witnesses, some of whom were very old and in poor health. However, the Trial Chamber holds that an accused is under no obligation to plead guilty and finds that the ‘lateness’ of Dragan Nikolic’s guilty plea can not be considered to be to his detriment. In contrast, his ‘late’ change to a plea guilty, i.e. 11 years after commission of the crimes, could be regarded as a consequence of a thorough analysis and reflection by the Accused of his criminal conduct, which reveals his genuine awareness of his guilt and a desire to assume responsibility for his acts. The Accused confessed to Dr. Grosselfinger and to his close relatives that after pleading guilty he felt relieved, and that a burden he had been carrying was gone. Moreover, by pleading guilty prior to the commencement of the trial the Accused relieved the victims of the need to open old wounds.”

(xiii) pleas in other countries

For discussion of the use of guilty pleas in other countries, *see, e.g., Deronjic*, (Trial Chamber), March 30, 2004, paras. 230, 232, 233; *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, paras. 226-232.

(xiv) application—guilty pleas

Babic, (Appeals Chamber), July 18, 2005, para. 68: “The Appeals Chamber finds that the Trial Chamber did take this mitigating circumstance [Babic’s admission of guilt] into account. It found it to be ‘exceptional’ and did consider it in its final determination.”

Bralo, (Trial Chamber), December 7, 2005, para. 72: “The Trial Chamber . . . recognises that Bralo’s guilty plea, combined with his genuine remorse, is likely to have a positive effect on the rehabilitation of the victims of his crimes, and their communities. As stated by Mehmed Ahmic, the current President of the Ahmici Municipality Council, Bralo is the first person charged by the Tribunal with crimes committed in that area who has admitted his criminal conduct. It accepts his view that this acknowledgement of wrongdoing is extremely important for the entire community in its continuing process of recovery and reconciliation.”

Babic, (Trial Chamber), June 29, 2004, paras. 69-70: “The Trial Chamber considers that by his guilty plea and his account of the events, Babic has contributed significantly to the reconciliation process in the territory of the former Yugoslavia, in particular in Croatia and Bosnia-Herzegovina.” “Babic’s acceptance of guilt is exceptional because his admission of facts and of guilt made it likely that an indictment would be issued against him. As mentioned earlier, despite being warned that he might incriminate himself, Babic gave extensive suspect interviews to investigators of the Prosecution during which he admitted bearing a certain responsibility.”

Mrdja, (Trial Chamber), March 31, 2004, para. 79: “The Trial Chamber accepts that Darko Mrdja’s guilty plea helps to establish the truth surrounding the crimes committed on 21 August 1992 at Koricanske Stijene, and thus, in the long term, it may encourage reconciliation among the people of Bosnia and Herzegovina. The Trial Chamber therefore considers the guilty plea to be a mitigating factor.”

Deronjic, (Trial Chamber), March 30, 2004, paras. 3, 238, 241: “In confessing his individual guilt and admitting all factual details contained in the Second Amended Indictment and in an additional Factual Basis . . . , Miroslav Deronjic has guided the international community closer to the truth on crimes committed in the area of Glogova, truth being one prerequisite for peace. He has helped, to a certain extent, to protect against any kind of revisionism.”

“The Trial Chamber accepts that [Deronjic’s] guilty plea tends to contribute to the process of reconciliation in Bratunac in particular and in Bosnia and Herzegovina in general.” “[T]he Trial Chamber concludes that Miroslav Deronjic’s guilty plea and his readiness to testify in other trials assists the Tribunal in its search for the truth and prevents historical revisionism. It also spares the victims and witnesses from being required to come and testify about painful and traumatic events. The Trial Chamber

agrees that the Accused's early guilty plea contributes to the public advantage and saves the Tribunal's costs, however, the latter having not a significant mitigating effect."

Jokic - Miodrag, (Trial Chamber), March 18, 2004, paras. 77-78: "The Trial Chamber recognizes that Miodrag Jokic's guilty plea prior to the commencement of the trial contributes to establishing the truth about the events in and around the Old Town of Dubrovnik on 6 December 1991. Mutual understanding and conciliation presuppose, to some extent, a true and acknowledged record of the events which made up the conflict in the former Yugoslavia. The Trial Chamber believes that such mutual appreciation of the events can be only advanced by Miodrag Jokic's guilty plea. His plea has the potential to strengthen the foundations for reconciliation between the peoples of the former Yugoslavia and for the restoration of a lasting peace in the region." "The Trial Chamber concludes that Miodrag Jokic's guilty plea is an important factor going to the mitigation of the sentence to be imposed."

Cesic, (Trial Chamber), March 11, 2004, paras. 59-60: "In this case, the plea was entered some sixteen months after the initial appearance of the Accused, but nevertheless still before the commencement of trial, thereby saving time, effort and resources. The jurisprudence of the Tribunal has accepted that this factor counts in mitigation of punishment." "Under these circumstances, the Trial Chamber finds that the guilty plea in the present case is an important mitigating circumstance."

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 3: "In confessing his guilt and admitting all factual details contained in the Third Amended Indictment in open court on 4 September 2003 Dragan Nikolic has helped further a process of reconciliation. He has guided the international community closer to the truth in an area not yet subject of any judgement rendered by this Tribunal, truth being one prerequisite for peace."

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 235, 237: "Dragan Nikolic has pleaded guilty to the entire indictment. The importance of this fact is strengthened by the consideration that this is the first case at this Tribunal in which the events in [the] Susica camp have been recounted." "Therefore, the Trial Chamber recognises the importance of Dragan Nikolic's guilty plea as an expression of his honesty and readiness to take responsibility, and coupled with his expression of remorse and his co-operation with the Prosecution, as a contribution to reconciliation in Vlasenica municipality."

Obrenovic, (Trial Chamber), December 10, 2003, paras. 111, 112, 115-117: "The Trial Chamber finds that Dragan Obrenovic's guilty plea is indeed significant and can contribute to fulfilling the Tribunal's mandate of restoring peace and promoting reconciliation. The recognition of the crimes committed against the Bosnian Muslim population in 1995 – crimes that continue to have repercussions into the present – by a participant in those crimes contributes to establishing a historical record and countering

denials of the commission of these crimes. Although the victims of these crimes and family members of those killed were fully aware of the crimes committed before Dragan Obrenovic pled guilty, it cannot be doubted that the *recognition* of the crimes committed against them by a former officer of the Army of Republika Srpska may provide some form of closure.”

“The Defence tendered an article by Emir Suljagic, a Bosnian Muslim from Srebrenica, on the impact of Dragan Obrenovic’s guilty plea on him as an individual who had survived but who had lost relatives and close friends during the executions in July 1995, and as a member of the Bosnian Muslim community. Mr. Suljagic writes that although the confession of Mr. Obrenovic and Mr. Nikolic will likely not transform Bosnian Serb views, for him personally:

the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgement I have been looking for these past eight years. While far from an apology, these admissions are a start. We Bosnian Muslims no longer have to prove we were victims. Our friends and cousins, fathers and brothers were killed – we no longer have to prove they were innocent.”

“The Trial Chamber further finds that Dragan Obrenovic, in accepting his responsibility and his guilt has never sought to offer excuses or shift the responsibility for his actions.”

“Taking into account these considerations, the Trial Chamber finds that Dragan Obrenovic’s guilty plea is a significant factor in mitigation of the sentence due to its contribution to establishing the truth, promoting reconciliation and because of Dragan Obrenovic’s unreserved acceptance of his individual criminal responsibility for his role in the crime of persecutions.”

“The Trial Chamber also considers Dragan Obrenovic’s guilty plea as a mitigating factor because it spared witnesses from being required to come and testify about painful and traumatic events. This is particularly appreciated in the case of Srebrenica where there are numerous indictments brought by the Prosecution, and future trials will likely require the presence of these witnesses.” (emphasis in original)

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 149, 150: “[T]he Trial Chamber finds that Momir Nikolic’s guilty plea is an important factor in mitigation of the sentence due to its contribution to establishing the truth, promoting reconciliation and because of Momir Nikolic’s acceptance of his individual criminal responsibility for his role in the crime of persecutions.” “The Trial Chamber also considers Momir Nikolic’s guilty plea as a mitigating factor because it spared witnesses from being required to come and testify about painful and traumatic events. This is particularly appreciated in the case of Srebrenica where there are numerous indictments brought by the Prosecution, and future trials will likely require the presence of these witnesses.”

Banovic, (Trial Chamber), October 28, 2003, para. 69: “The Trial Chamber . . . finds that Predrag Banovic should receive full credit for his plea as a mitigating factor.”

Plavsic, (Trial Chamber), February 27, 2003, paras. 73, 80, 81: “The Trial Chamber accepts [Plavsic’s expression of remorse at the Sentencing Hearing], together with expressions in her earlier statement in support of the motion to change her plea, as an expression of remorse to be considered as part of the mitigating circumstances connected with a guilty plea. This, together with the substantial saving of international time and resources as a result of a plea of guilty before trial, entitle the accused to a discount in the sentence which would otherwise have been appropriate. . . .” “The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. [T]he Trial Chamber concludes that the guilty plea of Mrs. Plavsic and her acknowledgement of responsibility, particularly in the light of her former position as President of Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole.” “The Trial Chamber will . . . give significant weight to the plea of guilty by the accused, as well as her accompanying expressed remorse and positive impact on the reconciliatory process, as a mitigating factor.”

For discussion of the procedures for entering a guilty plea, see “Accepting guilty pleas,” Section (X)(f), ICTY Digest.

See also “steps taken toward rehabilitation/ reconciliation” as a mitigating factor, Section (IX)(c)(iv)(3)(j), ICTY Digest.

(xv) application—fighting revisionism

Deronjic, (Trial Chamber), March 30, 2004, paras. 257-260: “The Trial Chamber admitted into evidence a document which represents one of the worst examples of revisionism in relation to the mass executions of Bosnian Muslims committed in Srebrenica in July 1995. This document, titled ‘Report about Case Srebrenica (the First Part)’ was prepared by the Documentation Centre of Republika Srpska, Bureau of Government of Republika Srpska for Relation with ICTY on 1 September 2002. Throughout this report reference is made to the ‘alleged massacre’ and this misrepresentation of the historical events culminates in the final conclusion of this report, which reads:

[...] the number of Muslim soldiers who were executed by Bosnian Serb forces for personal revenge or for simple ignorance of international law [...] would probably stand less than 100.”

“Another example of revisionism is the ‘Declaration of the Republika Srpska Civilian Affairs Committee for Srebrenica’ No. 07-27/95, dated 17 July 1995, which was signed by the Accused in this case, Miroslav Deronjic, Civil Affairs Commissioner for Srebrenica, Nesib Mandzic, Representative of the Civilian Authorities of the Enclave of Srebrenica, and Major Franken, an UPROFOR Representative, Dutch Battalion Commander, at the time. This document in its operative part states that

- The civilian population can remain in the enclave or evacuate, dependant upon the wish of each individual;

- In the event that we wish to evacuate it is possible for us to choose the direction of our movement and have decided that the entire population is to evacuate to the territory of the County of Kladanj;

- It has been agreed that the evacuation is to be carried out by the Army and Police of the Republic of Srpska, supervised and escorted by UNPROFOR [UN Protection Force in Bosnia] [...]

During the evacuation there were no incidents on either of the sides and the Serb side has adhered to all the regulations of Geneva Conventions and the international war law, as far as convoys actually escorted by UN forces are concerned.”

“The Trial Chamber accepts the submission by the Prosecution that Miroslav Deronjic with the encouragement of Radovan Karadzic prepared this document, whose ‘contents [according to the Accused] did not correspond with the truth’ and that it was done in order ‘to mislead the international community.’”

“Consequently, the Trial Chamber agrees that the Accused’s admission is important for two reasons: 1) ‘[it is] important to diffuse any suggestion in trials that are ongoing or will be coming up in the future about Srebrenica that the Bosnian Muslims left the enclave because of their own free will’ and 2) ‘[it is] important to negate the arguments of future revisionists that might use this document for the proposition that the forcible displacement of the Bosniaks from Srebrenica was a mere humanitarian evacuation conducted in accordance with the principles of international law.’”

“In conclusion, the Trial Chamber accepts the importance of the Accused’s statement about details of the mass execution of Bosnian Muslims committed in Srebrenica in July 1995 and about individual persons’ roles in it, and that he prepared the aforementioned document, leaving, however, the final assessment to those Chambers seized of these crimes. The Trial Chamber agrees that the Accused’s and others’ acknowledgement of these crimes serves two purposes: it establishes the truth and it undercuts the ability of future revisionists to distort historically what happened. Therefore, the Trial Chamber attributes significant weight to this factor in mitigating Miroslav Deronjic’s sentence.”

(d) remorse

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 715: “The Appeals Chamber observes that acts or expressions evidencing real and sincere remorse may be treated as a mitigating circumstance. It also notes that the Trial Chamber did not mention remorse as a mitigating circumstance it took into account when deciding upon the sentence. However, the Trial Chamber has discretion as regards the factors it considers in mitigation, the weight it attaches to a particular mitigating factor, and the discounting of a particular mitigating factor. A discernible error on the part of the Trial Chamber has to be demonstrated in order for the Appeals Chamber to intervene.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 705: “The Trial Chamber correctly identified the requirement that, in order to be a factor in mitigation, the remorse expressed by an accused must be real and sincere.” See also *Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 177; *Mrdja*, (Trial Chamber), March 31, 2004, para. 85; *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 89; *Banovic*, (Trial Chamber), October 28, 2003, para. 72; *Simic, Tadic, and Zari*, (Trial Chamber), October 17, 2003, para. 1066; *Simic - Milan*, (Trial Chamber), October 17, 2002, para. 92 (all stating that remorse must be sincere).

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 177: “The Appeals Chamber is of the view that an accused can express sincere regrets without admitting his participation in a crime, and that that is a factor which may be taken into account.” See also *Brdjanin*, (Trial Chamber), September 1, 2004, para. 1139 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 470 (similar).

Brabo, (Trial Chamber), December 7, 2005, para. 65: “[W]here the plea, and the circumstances in which it came to be made, involves a profound acknowledgement of personal responsibility, it may demonstrate that an accused is genuinely remorseful.”

Blaskic, (Trial Chamber), March 3, 2000, para. 774: “[T]he feeling of remorse must be analysed in the light of not only the accused’s statements but also of his behaviour (voluntary surrender, guilty plea).”

See also “steps taken toward rehabilitation/ reconciliation” as a mitigating factor, Section (IX)(c)(iv)(3)(f), ICTY Digest.

See also “subsequent conduct, including attempts to further peace” as a mitigating factor, Section (IX)(c)(iv)(3)(f), ICTY Digest.

See also “no error to consider post-conflict conduct as an expression of remorse,” Section (X)(e)(xvii)(7), ICTY Digest.

(i) application—remorse

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 52: “[T]he Trial Chamber took into consideration, as an expression of his sincere remorse, the radiogram sent by the Appellant as an apology for the shelling [of the Old Town of Dubrovnik], the ceasefire agreement [that Jokic negotiated] and its implementation, as well as his participation in political activities aimed at promoting a peaceful solution to conflicts in the region after the war.”

Babic, (Appeals Chamber), July 18, 2005, paras. 71-72: Rejecting Babic’s argument that the Trial Chamber failed to ascribe sufficient weight to his expression of remorse: “The Appeals Chamber notes that the Trial Chamber considered the Appellant’s expression of

remorse both before and after he entered his plea of guilt, and did take this circumstance into account in mitigation.”

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 59: “[T]he Trial Chamber clearly considered [Nikolic’s] remorse as one of the mitigating circumstances entailing a substantial reduction of sentence”

Blaskic, (Appeals Chamber), July 29, 2004, paras. 712, 705: “[T]he Appeals Chamber does consider that the particular circumstances of the Appellant at the outset of and during the war deserve consideration. . . . The Appellant regretted the subsequent conflict with the [Armed Forces of the Government of Bosnia and Herzegovina], and testified: ‘However, as I was also a military commander in the midst of this conflict, it was my duty, and I also had the authority and competence, to order legal, lawful combat operations against the forces of the Bosnia-Herzegovina army, which is what I did. Although I very much regret that the conflict ever took place, it was my duty, however, to protect the Croatian community in the enclaves, and all the population living in those isolated pockets throughout Central Bosnia.’”

“The Appeals Chamber, . . . in light of its own considerations of the trial record, assessed together with the new evidence admitted on appeal, considers that the limited orders that the Appellant issued do not serve to undermine a finding that his remorse is real and sincere. The Appeals Chamber has also considered substantial evidence of the Appellant’s so-called humanitarian orders. . . . The Appellant’s expressions of remorse therefore constitute a factor in mitigation of sentence.”

Bralo, (Trial Chamber), December 7, 2005, paras. 69, 71: “The Trial Chamber accepts that, after the end of the armed conflict, Bralo was devastated by the trauma of the conflict and the part that he played in it. He attempted to surrender himself to the Tribunal in 1997, despite being unaware of the actual existence of an indictment against him. He also engaged in community work in a different region of Bosnia and Herzegovina. His efforts to assist in the location of the remains of his victims and others killed in the course of the conflict, and to aid de-mining operations, are to be commended, and the Trial Chamber is mindful of the statement given by Zaim Kablar, who has been involved in the location and exhumation of bodies in central Bosnia, and who has described the importance of Bralo’s contribution to finding the remains of several of his victims, and the positive effect that this has had on the families of those victims and the local community. His acknowledgement of responsibility for his crimes and expressions of regret directed to his victims are important indicators that he has undergone a personal transformation. The Trial Chamber is confident that this transformative process will continue as he serves his sentence and that his punishment will have a further rehabilitative effect.” “The Trial Chamber therefore considers that Bralo’s plea, taken with his behaviour following the appalling events of the Indictment, and particularly the efforts he has made to try to atone for his crimes, demonstrate that he is genuinely remorseful.”

Strugar, (Trial Chamber), January 31, 2005, paras. 470, 471: “In the present case, there is evidence that the Accused expressed his regret in a letter to Minister Rudolf [Croatian Minister for Maritime Affairs and Foreign Affairs] on the day after the attack. In light of the circumstances at the time, however, in particular the ongoing negotiations with the Croatian representatives, the role of the Accused in the attack on Srd, and his failure to investigate and punish the perpetrators of the crimes, the Chamber is not able to accept that this letter was an expression of sincere remorse.”

“After the closing arguments of the parties, however, the Accused asked to be allowed to make a statement to the Chamber. He stated in particular:

I am genuinely sorry for all human casualties and for all the damage caused. I am genuinely sorry all the victims, for all the people who were killed in Dubrovnik, as well as for all those young soldiers who were killed on Srd as well as in other areas and positions. I am sorry that I was unable to do anything to stop and prevent all that suffering,

The Chamber accepts the sincerity of this statement although it takes a different position from the Accused with respect to the last sentence.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1139: “In this case, the Accused has made no such statement [of sincere regrets], but throughout the trial there were a few instances when, through Defence counsel, he told witnesses that he felt sorry for what they had suffered. The Trial Chamber has no reason to doubt the sincerity of the Accused in offering his regret, and will take these instances into consideration as a mitigating factor for the purpose of sentencing the Accused.”

Babic, (Trial Chamber), June 29, 2004, paras. 82-84: “The Trial Chamber notes that during one of the interviews given to investigators of the Office of the Prosecutor on 23 February 2002, Babic stated:

Today with this awareness, consciousness I have and the knowledge I have, I certainly wouldn't act in that way, I wouldn't conduct myself in that way, but at that time my role could have been much better, or not at all, to have no role at all. And in some way I feel shame and ... I feel shame for what happened and I also regret it, regret for having participated in a certain way in these events, which were ugly.”

“After his guilty plea was entered before the Trial Chamber, Babic again expressed his remorse:

I come before this Tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs. Innocent people were persecuted; innocent people were evicted forcibly from their houses; and innocent people were killed. Even when I learned what had happened, I kept silent. Even worse, I continued in my office, and I became personally responsible for the inhumane treatment of innocent people.

He continued:

These crimes and my participation therein can never be justified. I'm speechless when I have to express the depth of my remorse for what I have done and for the effect that my sins have had on the others. I can only hope that by expressing the truth, by admitting to my guilt, and expressing the remorse can serve as an example to those who still mistakenly believe that such inhuman acts can ever be justified. Only truth can give the opportunity for the Serbian people to relieve itself of its collective burden of guilt. Only an admission of guilt on my part makes it possible for me to take responsibility for all the wrongs that I have done."

"The Trial Chamber is satisfied that the remorse expressed by Babic is sincere and consequently constitutes a mitigating factor."

Mrdja, (Trial Chamber), March 31, 2004, para. 87: "[T]he Trial Chamber finds that Darko Mrdja's public apologies to the victims and their families and his demeanour during the Sentencing Hearing, reflect his sincere remorse. Darko Mrdja has expressed the wish that his gesture will contribute to peace and has cooperated in a substantial manner with the Prosecution. This also constitutes evidence of his remorse which the Trial Chamber accepts as a mitigating factor."

Deronjic, (Trial Chamber), March 30, 2004, paras. 263, 264: "The Trial Chamber accepts that the Accused expressed his remorse publicly during the Sentencing Hearing." "Additionally, the Trial Chamber accepts the submission by the Defence that Deronjic's remorse resulted in his admission of guilt, his substantial co-operation with the Prosecution and his public expression of remorse, both during the Sentencing Hearing and in the interviews with the Prosecution as reflected in the records of these interviews. Therefore, the Trial Chamber takes it into consideration as a mitigating factor in determining the Accused's sentence." *But see Deronjic*, (Trial Chamber), Dissenting Opinion of Judge Schomburg, March 30, 2004, para. 17 ("The remorse shown by the Accused is hardly credible, *inter alia*, because from testimony to testimony given after his guilty plea, he wants to minimize his guilt.")

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 92: "The Trial Chamber finds that Miodrag Jokic's public expression of regret to the victims and their families, his conduct following the attack of 6 December 1991 on the Old Town of Dubrovnik, his demeanour during the Sentencing Hearing (when he openly talked about his 'regret'), together reflect his sincere remorse. The fact that, at a certain point after voluntarily surrendering to the Tribunal, Miodrag Jokic pleaded guilty and subsequently co-operated in a substantial manner with the Prosecution, as explained below, corroborates this conclusion."

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 241, 242: "The Trial Chamber accepts that remorse was shown during the sentencing hearing. The Trial Chamber recalls, in particular, the following statement by the Accused:

I repent sincerely [...]. I genuinely repent. I am not saying this *pro forma*, this repentance and contrition comes from deep inside me, because I knew most of those people from the earliest stage. [...] I want to avail myself of this opportunity to say to all of those whom I hurt, either directly or indirectly, that I apologise to everyone who spent any time in Susica, be it a month or several months. I would like, now that I have this opportunity to speak in public, to make even those victims feel the sincerity of my apology and my repentance, even those who were never at the Susica camp and who are now scattered all over the world as a result of that conflict and the expulsions which made it impossible for them to return home.”

“The Trial Chamber accepts his expression of remorse as one mitigating factor among others.”

Obrenovic, (Trial Chamber), December 10, 2003, para. 121: “The Trial Chamber has had the opportunity to observe Dragan Obrenovic at the Plea Hearing, over his seven days of testimony in the *Blagojevic* Trial and at the Sentencing Hearing. The Trial Chamber has carefully considered Dragan Obrenovic’s expression of remorse and his apologies to the victims for his participation in, what he described as, the ‘horror of Srebrenica.’ Through his statements and his actions, the Trial Chamber finds that Dragan Obrenovic is genuinely remorseful for his role in the crimes for which he has been convicted, and seeks to atone for his criminal conduct. Therefore, the Trial Chamber considers Dragan Obrenovic’s remorse to be a substantial mitigating factor in his case.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 159-161: “This Trial Chamber has had the opportunity to observe Momir Nikolic at his two-day Plea Hearing, over the course of his eight days of testimony in the *Blagojevic* Trial and at his three-day Sentencing Hearing. The Trial Chamber has carefully considered Momir Nikolic’s expression of remorse and his apology to the victims, their families and the Bosniak people for his participation in the crime of persecutions.” “The Trial Chamber recalls Momir Nikolic’s explanation of his reasons for pleading guilty, as well as his related reason for providing the Prosecution with false information during the plea negotiations.” “Recalling that the standard for mitigating factors is on the balance of probabilities, the Trial Chamber finds that Momir Nikolic’s expression of remorse is a mitigating factor, but cannot afford substantial weight to this factor.”

Banovic, (Trial Chamber), October 28, 2003, para. 72: “If the Accused did not accept responsibility [prior to entering his plea], he was only exercising a fundamental right recognised by the Statute. The Trial Chamber is thus satisfied that the statements made by the Accused, both during the interviews with the Prosecution and at the Sentencing Hearing, are expressions of sincere remorse.”

See also Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1098 (accepting “that Miroslav Tadic expressed genuine remorse and find[ing] this to be a mitigating

circumstance.”); *Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 1111 (same regarding Simo Zarić); *Cesic*, (Trial Chamber), March 11, 2004, paras. 63, 66 (statements of remorse found sincere and considered a mitigating factor).

Compare Kvočka et al., (Appeals Chamber), February 28, 2005, para. 715: “The Appeals Chamber notes the limited and qualified nature of Zigić’s remorse. Zigić confessed that he kicked Sead Jusufagić once, and that he hit Witness AK once for which he expressed some remorse. This expression of remorse covers only a fraction of the crimes for which Zigić has been convicted. As such, the Appeals Chamber considers that it was within the Trial Chamber’s discretion not to consider Zigić’s remorse as a mitigating circumstance.”

Compare Vasićević, (Appeals Chamber), February 25, 2004, paras. 175, 177: “The Appellant submits that the Trial Chamber erred by finding that he had not shown any remorse for his participation in the killing of the five Muslim men, including his friend Meho Džafić, that were killed on the bank of the Drina River.” “The Trial Chamber considered a number of factors put forward by the Appellant as mitigating circumstances, including his repentance or remorse. In the Trial Chamber’s finding that the Appellant did not show any remorse for his participation in the Drina River incident, the Appeals Chamber understands that the Trial Chamber exercised its own discretion in deciding that the words used by the Appellant did not show real remorse and could not therefore be considered as a mitigating circumstance. The Appellant has not shown that the Trial Chamber committed any error in the exercise of its discretion.”

Compare Kvočelac, (Appeals Chamber), September 17, 2003, para. 257: “[T]he Trial Chamber . . . pointed out that Kvočelac’s insubstantial regret could not be taken into account as significant mitigation.”

Compare Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1087: “The Trial Chamber is not satisfied that Blagoje Simić demonstrated any genuine remorse.”

(e) duress/ superior orders

Bralo, (Trial Chamber), December 7, 2005, para. 53: “Duress and superior orders are separate, but related, concepts and either may count in mitigation of sentence.”

Mrdja, (Trial Chamber), March 31, 2004, paras. 65, 67: “[F]rom a legal standpoint . . . , superior orders may be pleaded in mitigation independently of duress, and vice versa. Thus, a subordinate may be granted mitigation where he has executed an order without having been directly threatened, such as when the order was not manifestly illegal. Conversely, a person with no superior authority over another may compel him to commit a crime by means of threats.” “Article 7.4 of the Statute states that “[t]he fact that an accused person acted pursuant to an order of a government or of a superior [...]”

may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

Krstić, (Trial Chamber), August 2, 2001, para. 714: “[I]n some cases, forced participation in a crime can be a mitigating circumstance.”

Erdemović, (Trial Chamber), March 5, 1998, para. 17: Duress “may be taken into account only by way of mitigation.” The Trial Chamber held that there was duress in this case and found “that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.”

For discussion of the fact that duress is not an affirmative defense, see (VII)(b), ICTY Digest.

(i) application—duress/superior orders

Bralo, (Trial Chamber), December 7, 2005, paras. 53-56: “[T]he Trial Chamber notes the Defence submission that, as a consequence of his actions in February 1993, Bralo was held in custody in Kaonik prison until 15 April of that year. The Factual Basis for the Plea Agreement between the Prosecution and Bralo also indicates that he was released from this prison on the condition that he participate in the attack on Ahmici. The Trial Chamber therefore accepts that Bralo was under some pressure to become a member of the ‘Jokers’ [a so-called anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council (HVO)] and to be actively involved in combat operations carried out by the HVO. There is no evidence to suggest that he attempted to resist this pressure, but the question is nonetheless raised of whether he was acting under duress when he committed his crimes and, or alternatively, whether his crimes were committed as a result of superior orders.”

“Bralo has not, however, alleged any form of duress emanating from his superiors such that he was compelled to commit the crimes of which he has been convicted. Nor has he specifically pleaded superior orders as a factor in mitigation of sentence. He has taken full personal responsibility for those crimes and has acknowledged that he knew them to be wrong. It is the duty of any person involved in an armed conflict to comply fully with the relevant norms of international humanitarian law and, while Bralo may have been pressured to participate in combat activities, he remained legally and morally obliged to conduct himself in accordance with those norms. Once again, the Trial Chamber recalls the particularly brutal treatment of Witness A by Bralo, his participation in the killing of numerous civilians, including children, and his humiliation of civilian detainees by forcing them to perform a religious ritual. All of his actions display his complete contempt at the time for the laws governing armed conflict, along with a shocking disregard for the value of human life and dignity.”

“In addition, the Trial Chamber notes that Bralo did indeed have a choice with regard to his continued participation in the combat activities of the [Croatian Defence Council (HVO)] following his release from prison. The Defence has stated in its Sentencing Brief that he chose, in late 1994, not to fight any more, and refused to leave his bed in Nadioci. It has not been argued that he suffered any negative consequences in the sense of disciplinary or other action following his refusal to fight at that point. Bralo therefore could, and should, have refused to participate in combat activities at an earlier stage if he was given orders that he knew to be unlawful, or was required to engage in activities that he knew to be illegal. While the Trial Chamber has not received evidence of the orders that he was given to kill civilians and destroy civilian homes in the context of the attack on Ahmici, such orders are referred to in the Factual Basis, and their existence is therefore not questioned. However, these orders would have been so manifestly unlawful that Bralo should have refused to implement them. No evidence has been submitted, and no argument made, that he made any attempt to resist the undertaking of the crimes he committed.”

“The Trial Chamber therefore finds that Bralo’s circumstances in the period leading up to and surrounding the commission of his crimes do not amount to mitigating circumstances. The Chamber also finds that any orders given to Bralo to kill civilians and destroy homes would have been manifestly unlawful, such that they have no mitigatory value in the determination of sentence in the present case. While it may be the case that Bralo was used by his superiors as a ‘weapon of war,’ once again the Trial Chamber finds that this has no bearing upon the appropriate punishment that he should receive for his crimes.”

Mrdja, (Trial Chamber), March 31, 2004, paras. 65-68: “The Trial Chamber will deal with the issues of duress and superior orders in turn. Admittedly, in the present instance, the two matters are intimately linked since, as the Defence argues, the orders issued by Darko Mrdja’s superiors were accompanied by duress, namely, a threat of death.”

“With respect to duress, the Defence argues that Darko Mrdja would have been killed or, at the very least, suffered serious consequences, had he not carried out the orders of his superiors. In support of this argument, the Defence relies only upon the oral statement made by Darko Mrdja during the sentencing hearing. The Trial Chamber is not persuaded on the basis of this evidence that Darko Mrdja indeed acted under threat. The Defence also asserts that, in the light of Professor Gallwitz’s Report and against the backdrop of hatred prevailing at the material time, a person as young and of such low rank as Darko Mrdja could not have opposed the orders he received. The Trial Chamber does not rule out that those circumstances may have had some influence on the criminal behaviour of Darko Mrdja, although it does not accept that they were such that Darko Mrdja, even taking account of his age and low rank, would have had no alternative but to participate in the massacre of around 200 civilians. The absence of any convincing evidence of any meaningful sign that Darko Mrdja wanted to dissociate

himself from the massacre at the time of its commission prevents the Trial Chamber from accepting duress as a mitigating circumstance.”

“The Trial Chamber notes that the Prosecution does not contest the fact that Darko Mrdja acted in furtherance of his superiors’ orders. The Trial Chamber has already stated that there is no evidence that the orders were accompanied by threats causing duress. Moreover, the orders were so manifestly unlawful that Darko Mrdja must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment.” “In conclusion, the Trial Chamber dismisses the Defence’s submissions with respect to duress and superior orders.”

For discussion of the Erdemovic case, see (VII)(b), ICTY Digest.

(f) indirect participation/ participation relative to other members of a joint criminal enterprise

Babic, (Appeals Chamber), July 18, 2005, para. 40: “[G]enerally it may be said that a finding of secondary or indirect forms of participation in a joint criminal enterprise relative to others may result in the imposition of a lower sentence. . . .”

Krstic, (Trial Chamber), August 2, 2001, para. 714: “Indirect participation is one circumstance that may go to mitigating a sentence. An act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission.”

Compare Delalic et al., (Appeals Chamber), February 20, 2001, para. 737: “[A]bsence of . . . active participation is not a mitigating circumstance [when considering command responsibility]. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability.”

(i) application—indirect participation

Krstic, (Appeals Chamber), April 19, 2004, paras. 272-273: “The Appeals Chamber believes . . . that four further factors must be accounted for in mitigation of Krstic’s sentence, namely: (i) the nature of his provision of the Drina Corps assets and resources; (ii) the fact that he had only recently assumed command of the Corps during combat operations; (iii) the fact that he was present in and around the Potocari for at most two hours; and (iv) his written order to treat Muslims humanely.”

“First, while Radislav Krstic made a substantial contribution to the realization of the genocidal plan and to the murder of the Bosnian Muslims of Srebrenica, his actual involvement in facilitating the use of Drina Corps personnel and assets under his command was a limited one. Second, while the Appeals Chamber has found that Krstic

assumed command of the Drina Corps on 13 July 1995, it accepts that the recent nature of his appointment, coupled with his preoccupation with conducting ongoing combat operations in the region around Zepa, meant that his personal impact on the events described was further limited. Third, Krstic was present in and around the Potocari compound during the afternoon of 12 July 1995 for at most two hours, a period which, the Appeals Chamber finds, is sufficiently brief so as to justify a mitigation of sentence. Finally, as discussed above, Radislav Krstic made efforts to ensure the safety of the Bosnian Muslim civilians transported out of Potocari, he issued an order that no harm befall civilians while guaranteeing their safe transportation out of the Srebrenica area, and he showed similar concerns for the Bosnian Muslim civilians during the Zepa campaign. Krstic's personal integrity as a serious career military officer who would ordinarily not have been associated with such a plan at all, is also a factor in mitigation." *See also Krstic*, (Appeals Chamber), April 19, 2004, para. 254.

Compare Babic, (Appeals Chamber), July 18, 2005, paras. 38, 40: "[T]he Appeals Chamber finds that it was within the discretion of the Trial Chamber to choose not to attach greater weight to the fact that, as noted by the Prosecution, [Babic] 'did not commit the *actus reus* of any of the crimes constituting persecutions.' Co-perpetratorship in a joint criminal enterprise, for which the Appellant was found guilty, only requires that the accused shares the *mens rea* or 'intent to pursue a common purpose' and performs some acts that 'in some way are directed to the furtherance of the common design.' Participation in a joint criminal enterprise does not require that the accused commit the *actus reus* of a specific crime provided for in the Statute. Thus, the Appeals Chamber concludes that the Trial Chamber was entitled to consider as it did that the Appellant's role in providing support to the joint criminal enterprise was not as limited as the parties suggest."

"The Appeals Chamber notes that the . . . finding of the Appeals Chamber in the *Tadic* case was based on the 'circumstances of the case' and was not a legal finding to the effect that the participation of an accused in a joint criminal enterprise *must* always be assessed relative to the participation of other perpetrators in determining the overall level of the accused's participation. Furthermore, contrary to the Prosecution's submission, the Trial Chamber did take into account the Appellant's participation relative to other members of the joint criminal enterprise concluding that 'Babic was not the prime mover in the campaign of persecutions.' While generally it may be said that a finding of secondary or indirect forms of participation in a joint criminal enterprise relative to others may result in the imposition of a lower sentence, the Appeals Chamber finds that the Trial Chamber's conclusion in this case that, nevertheless, the Appellant's participation in the joint criminal enterprise was not as limited as the parties suggest, was the correct one in light of the totality of his acts demonstrating significant support for the joint criminal enterprise." (emphasis in original) *See also Babic*, (Trial Chamber), June 29, 2004, para. 79.

(g) diminished mental responsibility

Delalic et al., (Appeals Chamber), February 20, 2001, para. 590: “[T]he relevant general principle of law . . . is that the defendant’s diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. . . . Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.”

Vasiljevic, (Trial Chamber), November 29, 2002, paras. 282-283: “[T]he issue of diminished mental responsibility is relevant only to the sentence to be imposed. It is not a defence that if established would lead to the acquittal of the Accused. . . . [A]n accused suffers from a diminished mental responsibility where there is an impairment to his capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law.”

See also “Diminished mental responsibility is not a defense,” Section (VII)(e), ICTY Digest.

(h) voluntary surrender

Blaskic, (Appeals Chamber), July 29, 2004, para. 701: “Regarding the Appellant’s voluntary surrender, the International Tribunal has previously held that this may constitute a mitigating circumstance. . . .” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 472 (similar); *Deronjic*, (Trial Chamber), March 30, 2004, para. 266 (similar); *Obrenovic*, (Trial Chamber), December 10, 2003, para. 136 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 165 (similar); *Plavsic*, (Trial Chamber), February 27, 2003, para. 84 (similar).

Blaskic, (Trial Chamber), March 3, 2000, para. 776: “Voluntary surrender is deemed a significant mitigating circumstance in determining the sentence.”

(i) application—voluntary surrender

Babic, (Appeals Chamber), July 18, 2005, paras. 74, 75: “With regard to the fact that [Babic] surrendered without any arrest warrant, . . . the Trial Chamber correctly took into account [Babic’s] voluntary surrender as a mitigating circumstance and did consider it in its final determination.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 701: “[T]he Trial Chamber considered [Blaskic’s] voluntary surrender as a ‘significant mitigating circumstance in determining

the sentence,' among other relevant factors (including his *delayed* surrender)." (emphasis in original)

Bralo, (Trial Chamber), December 7, 2005, para. 61: "The Defence submits, and the Prosecution does not dispute, that Bralo surrendered voluntarily to the Tribunal in 2004, when he learned of the Indictment against him. The Trial Chamber agrees that the voluntary surrender of an accused person should be considered as a mitigating circumstance, and thus will give credit to Bralo for this."

Strugar, (Trial Chamber), January 31, 2005, para. 472: "In the present case, the Chamber notes that the Accused surrendered voluntarily to the Tribunal on 4 October 2001. The Chamber further notes that the Accused complied with the conditions set for his provisional release"

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 856: "The Trial Chamber finds that Dragan Jokic has co-operated with the Prosecution. He appeared for two interviews with the Prosecutor and voluntarily surrendered to the Authorities of this Tribunal. Accordingly, the Trial Chamber will take this into consideration as a mitigating factor."

Babic, (Trial Chamber), June 29, 2004, para. 86: "Babic's voluntarily appearance before this Tribunal soon after the confirmation of an indictment against him is an indication of his respect for the international administration of justice. The Trial Chamber considers it in mitigation in conjunction with the related indicators mentioned above."

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 73: "The Trial Chamber assigns due weight in mitigation to the fact that Miodrag Jokic, a high-ranking officer, voluntarily surrendered to the Tribunal."

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1097: "Although Miroslav Tadic surrendered on 14 February 1998, and thus arguably, a significant period of time after becoming aware of the existence of an Indictment against him, the Trial Chamber finds this to constitute a mitigating circumstance, as at the time, he was one of the first accused persons to voluntarily surrender to the custody of the Tribunal."

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 1110: "The Trial Chamber accepts that Simo Zaric's voluntary surrender to the custody of the Tribunal on 24 February 1998 constitutes a mitigating factor, as even though it occurred some time after the Indictment against him had come to his attention, Simo Zaric was one of the first accused from Republika Srpska to surrender."

Compare Babic, (Appeals Chamber), July 18, 2005, para. 74: "The Appeals Chamber finds that the Appellant's argument that he surrendered knowing that he 'would be facing a prison sentence' has no merit as this might equally be said of every accused having

surrendered and pled guilty before the International Tribunal for the serious crimes referred to in the Statute.”

Compare Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1053: “The Trial Chamber considered Kordic’s voluntary surrender and his behaviour in the United Nations Detention Unit. The jurisprudence of the International Tribunal shows that both factors have to be considered in mitigation of sentence. It must be recalled, however, that the weight given to each mitigating circumstance is a matter of discretion vested to the Trial Chamber. The Appeals Chamber does not see a discernible error in the Trial Chamber’s finding that in light of the gravity of the crimes and the position of Kordic as a political leader, his voluntary surrender and his comportment during detention do not warrant mitigation.”

Compare Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1086: “The Trial Chamber accepts that Blagoje Simic surrendered voluntarily on 12 March 2001 to the custody of the Tribunal. However, although this fact is a mitigating circumstance in itself, the Trial Chamber notes that Blagoje Simic, surrendered approximately three years after Miroslav Tadic and Simo Zaric, who also lived in Bosanski Samac up until their surrender. The Trial Chamber does not find that the weight given to Blagoje Simic’s surrender should be significant.”

(ii) voluntary surrender where person already incarcerated

Krnacka et al., (Appeals Chamber), February 28, 2005, paras. 709, 710, 713: “Zigic contends that his surrender to the Tribunal while in prison in Banja Luka should be considered a mitigating factor.” “Voluntary surrender may constitute a mitigating circumstance. However, the Trial Chamber did not consider Zigic’s surrender to be a mitigating circumstance ‘[d]ue to the fact that Zigic was imprisoned in Banja Luka at the time he surrendered to the Tribunal.’ The issue that is raised on these facts is whether, in light of Zigic’s incarcerated state, his surrender really can be described as voluntary.” “[T]he Appeals Chamber finds that the Trial Chamber committed an error when it declined to consider Zigic’s voluntary surrender to the Tribunal a mitigating factor. However, given the fact that Zigic was in prison at the time of his surrender, the Appeals Chamber does not consider that significant weight should be given to this mitigating circumstance.”

(iii) lack of opportunity to voluntarily surrender

Brdjanin, (Trial Chamber), September 1, 2004, para. 1134: “The fact that the Accused did not surrender to the Tribunal has not been given any weight either as a mitigating or an aggravating factor, since the Indictment relating to the Accused remained confidential until the day of his arrest, and consequently, he did not have any opportunity to surrender, even if he had wanted to do so.”

Deronjic, (Trial Chamber), March 30, 2004, paras. 266, 267: “The Trial Chamber accepts that Miroslav Deronjic was arrested even though he had offered to surrender voluntarily already the first time when he was informed of his status as a suspect. The Trial Chamber considers the Accused’s willingness to surrender voluntarily, as expressed in the records of an interview with the Prosecution investigators, to be a factor in mitigation of his sentence.” “However, as for the significance of this factor for the sentencing considerations, the Trial Chamber reiterates the conclusions reached by the Trial Chamber in *Obrenovic*, where it stated: ‘[...] since the Trial Chamber would have to speculate in order to determine whether Dragan Obrenovic *would* in fact have voluntarily surrendered if given the opportunity, the Trial Chamber attached little weight to this factor.’ The Trial Chamber concurs with this conclusion.” (emphasis in original)

Obrenovic, (Trial Chamber), December 10, 2003, para. 136: “The Trial Chamber notes that Dragan Obrenovic was arrested even though he had offered to surrender voluntarily knowing of his status as a suspect. The Trial Chamber finds his offer to voluntarily surrender, as reflected in the record of an interview held with the Prosecution, to be a factor in mitigation of sentence. However, since the Trial Chamber would have to speculate in order to determine whether Dragan Obrenovic *would* in fact have voluntarily surrendered if given the opportunity, the Trial Chamber attaches little weight to this factor.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 165-166: “In this case, Momir Nikolic submits that he was unaware of the indictment against him as it was sealed and therefore was unable to surrender voluntarily.” “The Trial Chamber, while recognising that Momir Nikolic did not evade the investigators from the Tribunal, cannot make the finding that had he known of his impending arrest, Nikolic would have surrendered voluntarily. In order to do so the Trial Chamber would have to engage in speculation. The Trial Chamber therefore does not take this factor into consideration.”

(i) subsequent conduct, including attempts to further peace

Babic, (Appeals Chamber), July 18, 2005, para. 55: “The Appeals Chamber notes that an accused’s conduct after committing a crime is relevant in that it reveals how aware he was of the wrongfulness of his actions and his intention to ‘make amends’ by, among other things, facilitating the task of the International Tribunal.”

Babic, (Trial Chamber), June 29, 2004, para. 94: “Conduct subsequent to the crime is a factor which has been accepted in other cases before the Tribunal where the convicted person acted immediately after the commission of the crime to alleviate the suffering of victims. For instance, in the *Plasic* case, the Trial Chamber accepted Biljana Plasic’s post-conflict conduct as a mitigating factor because after the cessation of hostilities she had demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove

obstructive officials from office in order to promote peace. By contrast, in the *Jokic* case, the Trial Chamber did not accept as a separate mitigating circumstance Miodrag Jokic's conduct immediately after the crimes. Instead, the Trial Chamber used that information as well as his subsequent conduct as evidence of the sincerity of his remorse."

For discussion of remorse as a mitigating factor, see Section (IX)(c)(iv)(3)(d), ICTY Digest.

For discussion of Appellate Chamber review of "weight given to, *inter alia*, peace efforts," see Section (X)(e)(xvi)(2), ICTY Digest.

See also "no error to consider post-conflict conduct as an expression of remorse," Section (X)(e)(xvi)(7), ICTY Digest.

(i) application—subsequent conduct, including attempts to further peace

Babic, (Appeals Chamber), July 18, 2005, para. 59: "The Appeals Chamber is satisfied that the Appellant attempted to further peace after the commission of the crime of persecution. The Appeals Chamber finds that the Trial Chamber erred in law in categorically refusing to take these attempts to further peace into account as a mitigating factor on the basis that they did not directly alleviate the suffering of the victims." See also *Babic*, (Appeals Chamber), Partially Dissenting Opinion of Judge Mumba, July 18, 2005, para. 4 (criticizing the Appeals Chamber for finding "that the Trial Chamber erred in failing to take into account the Appellant's efforts to achieve peace, subsequent to the commission of the crimes for which he was convicted, as a mitigating factor" and not revising the sentence).

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, paras. 858-860: "The Trial Chamber has heard evidence that after the Dayton Peace Accords, Vidoje Blagojevic has been actively engaged in planning, managing and organising a system of de-mining in the army of the Republika Srpska." "Mihajlo Cvijetic also worked closely with Dragan Jokic in [de-mining] activities." "The Trial Chamber emphasises that it condemns the use of mines as a means of warfare and fully supports the efforts taken by states and individuals in demining. Therefore, the Trial Chamber considers the activities of Vidoje Blagojevic and Dragan Jokic in the work of de-mining a mitigating circumstance."

Jokic - Miodrag, (Trial Chamber), March 18, 2004, paras. 89-91: "The Trial Chamber notes that it was already on 6 December 1991, the day of the shelling of the Old Town of Dubrovnik, that Miodrag Jokic demonstrated in the radiogram to Minister Rudolf his regret for the events." "[T]he Trial Chamber notes that the parties agree that Miodrag Jokic was instrumental in ensuring that a comprehensive ceasefire was agreed upon and implemented. The Trial Chamber also notes that Minister Rudolf considered Miodrag

Jokic a ‘willing, sincere and genuine negotiator.’” “Furthermore, the Trial Chamber was provided with information that, after the war, Miodrag Jokic participated in political activities programmatically aimed at promoting a peaceful solution to the conflicts in the region.”

Plavsic, (Trial Chamber), February 27, 2003, para. 94: “The Trial Chamber is satisfied that Mrs. Plavsic was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska. As such, she made a considerable contribution to peace in the region and is entitled to pray it in aid in mitigation of sentence. The Trial Chamber gives it significant weight.”

Compare Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 52: “One factor not considered by the Trial Chamber as a mitigating circumstance in the Sentencing Judgement was the verbal agreement reached on 5 December 1991 on a ceasefire and on mechanisms to improve the lives of the citizens of Dubrovnik. The Appeals Chamber finds that it was within the discretion of the Trial Chamber to consider that the verbal agreement, whose existence does not appear to have been disputed amongst the parties, did not constitute a mitigating circumstance.”

**(ii) application—significant weight need not be
given to attempts to further peace**

Babic, (Appeals Chamber), July 18, 2005, paras. 60, 61: “In the opinion of the Appeals Chamber, such an error [—the Trial Chamber’s refusing to take attempts to further peace into account as a mitigating factor—] does not automatically lead to a reduction of sentence. In light of the gravity of the crime for which the Appellant was convicted and the circumstances of the case, the Appeals Chamber finds that significant weight need not be given to the Appellant’s attempts to further peace.” “The Appeals Chamber notes that in light of the mandate of the International Tribunal under Chapter VII of the UN Charter, an attempt to further peace in the former Yugoslavia is in general relevant as a mitigating circumstance. In the concrete case before us, however, the Appeals Chamber recalls, *inter alia*, paragraph 53 of the Sentencing Judgement, where the Trial Chamber correctly held that it was ‘persuaded of the extreme gravity of the crime to which Babic pleaded guilty.’ A sentence must always be proportionate to the gravity of the crime, balancing this gravity and any aggravating factors against mitigating factors. Taken in the context of the complete picture of the Appellant’s conduct that was before the Trial Chamber, the Appeals Chamber is not persuaded that the Trial Chamber would have, or that it should have, issued a different sentence had it not excluded consideration of the . . . peace negotiations on the basis of the error of law identified above. This is particularly so in light of the gravity and aggravating circumstances of a very serious crime committed over a long period of time in the context of a long armed conflict, which at that time was in its initial phase. For these reasons, the Appeals Chamber concludes that the Appellant’s engagement in the . . . peace negotiations subsequent to

his involvement in the crime of persecution of non-Serbs does not require mitigation of his sentence.”

But see Babic, (Appeals Chamber), Partially Dissenting Opinion of Judge Mumba, July 18, 2005, para. 3: “It is my considered view that, where individuals who have committed grave crimes, subsequently choose to take steps to lessen the effects of their crimes on the local population and seek to restore a situation of peaceful co-existence, this is taken into account and accorded significant weight. Furthermore, since in this case the Appellant’s subsequent conduct has direct impact on the crimes for which he was convicted, it lends support to his argument and should be taken into account and given the appropriate weight.”

(j) steps taken toward rehabilitation/ reconciliation

Obreanovic, (Trial Chamber), December 10, 2003, para. 143: “This Trial Chamber has recognised that one of the purposes of punishment is rehabilitation. In so doing, the Trial Chamber also finds the necessary corollary that where an accused has demonstrated that he has already taken affirmative steps on the path toward rehabilitation, and that the process of rehabilitation is likely to continue in the future that this should be recognised in mitigation of sentence.”

(i) application—steps taken toward rehabilitation/ reconciliation

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 248-252: “The Trial Chamber considers this fact [Nikolic’s providing information to victims] as an attempt to achieve reconciliation by the Accused and his readiness and willingness to contribute to the truth-finding mission of the Tribunal.” “Moreover, in his final statement the Accused expressed the hope that all three parties to the conflict would be encouraged by his confession to assume their part of the responsibility for the terrible crimes because ‘that [...] is the only thing that would make it possible for people to become close again [...] in those parts. It should be clear to all of us that we are after all an important factor in this reconciliation and peaceful coexistence.’” “Finally, the Accused concluded:

I hope I will get a chance to redeem myself and to alleviate their suffering. [...] [M]ere words are not enough. Acts are needed, and I do intend to act for reconciliation for the return of those people who were displaced and expelled. That is my deepest wish.”

The accused “also expressed his willingness to meet and talk to the victims ‘at a time when it would not advantage him in any legal way,’ and he offered to contact persons who were friendly towards him and elicit their mediation in approaching others in order to ‘repair the social fabric.’” “The Trial Chamber opines that these statements . . . are a strong recognition by the Accused of the importance of his admission of guilt, and that they serve well as another example of his willingness to contribute to the peace-

building process and reconciliation in his region. Therefore, the Trial Chamber takes this into account for mitigation.”

Obrenovic, (Trial Chamber), December 10, 2003, paras. 144-146: “[T]he Trial Chamber finds that Dragan Obrenovic has, under the propulsion of his own conscience, begun the process toward rehabilitation. This process began shortly after the murder operations following the fall of Srebrenica, when after hearing a survivor of an execution on the radio, Dragan Obrenovic questioned General Radislav Krstic as to why the Muslims had been killed.

We stood there for about two minutes listening to the survivor and General Krstic ordered that the radio be switched off and said we should not listen to enemy radio. [...] On the way back I thought about the survivor's story on the radio and this lead me to ask General Krstic why the killings took place. I had said that we knew the people killed were all simple people and asked for the reason why they had to be killed. [...] General Krstic asked me where I had been. I said that I went to the field in Snagovo as ordered. Krstic cut me short and said that we should speak no more about this.

The process continued when in 1998 Dragan Obrenovic permitted the office of the Prosecutor to search the premises of the Zvornik Brigade [of the VRS (Army of Republika Srpska)] knowing that the search was likely to yield information that could incriminate him. Later, knowing that he held the status of a suspect, Dragan Obrenovic agreed to speak with the Office of the Prosecutor and cooperate in their investigation of Srebrenica on three occasions and went so far as to offer to turn himself in should an indictment be brought against him.”

“Dragan Obrenovic has continued the process toward rehabilitation since his arrest by taking full responsibility for the crimes he has committed, and by co-operating fully with Office of the Prosecutor.”

“The Trial Chamber finds by his expressed words and, more importantly, his *deeds*, that it is likely that upon his eventual release from his term of imprisonment, Dragan Obrenovic will continue the path that he has begun by continuing to take positive acts to atone for his responsibility in the crimes at Srebrenica. Therefore, the Trial Chamber finds that Dragan Obrenovic's affirmative steps toward rehabilitation are a factor in mitigation of sentence.” (emphasis in original)

(k) comportment while in detention

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1053: “The jurisprudence of the International Tribunal shows that [voluntary surrender and behaviour in the United Nations Detention Unit] have to be considered in mitigation of sentence. It must be recalled, however, that the weight given to each mitigating circumstance is a matter of discretion vested to the Trial Chamber.”

Bralo, (Trial Chamber), December 7, 2005, para. 82: “The Trial Chamber notes that good behaviour in detention may be considered as a mitigating circumstance. . . .”

Jokic - Miodrag, (Trial Chamber), March 18, 2004, paras. 100-102: “The jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors, such as: . . . good behaviour whilst at the United Nations Detention Unit However, the Tribunal has generally attached only limited importance to these factors. The *Banovic* Judgement highlighted that ‘many accused share these personal factors.’”

(i) application—comportment while in detention

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 49: “The Trial Chamber considered . . . the fact that [Jokic] conducted himself well in detention and complied fully with the terms and conditions of his provisional release” in evaluating mitigating circumstances.

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1091: “The Appeals Chamber took particularly into consideration [Cerkez’s] extraordinarily good behaviour when detained in the UNDU [United Nations Detention Unit]”

Strugar, (Trial Chamber), January 31, 2005, para. 472: “[T]he Chamber has no reason to doubt the parties’ submission with respect to the Accused’s good conduct during his detention at the UNDU [United Nations Detention Unit].”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 268: “The Trial Chamber will . . . take into account the behaviour and demeanour of Dragan Nikolic at the UNDU [United Nations Detention Unit] . . . :

McFadden [Head of the UNDU] indicated Nikolic had not been a problem detainee. His physical and mental health was relatively good and he had not distinguished himself in any negative way.”

Banovic, (Trial Chamber), October 28, 2003, para. 64: “The Trial Chamber accepts the Defence claim that the Accused has been cooperative and well behaved while in the custody of the Tribunal and has taken this factor into account.”

Simic, Tadic and Zanic, (Trial Chamber), October 17, 2003, para. 1091: Under the heading mitigating factors: “The Trial Chamber accepts the Report submitted by the Deputy Commander of the Detention Unit testifying to the good conduct of Blagoje Simic while in detention.” See also *Simic, Tadic and Zanic*, (Trial Chamber), October 17, 2003, para. 1102 (same regarding Miroslav Tadic); *Simic, Tadic, and Zanic*, (Trial Chamber), October 17, 2003, para. 1114 (same regarding Simo Zanic, but also considering one “incident” discussed in the detention report regarding him).

Compare Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1053: “The Appeals Chamber does not see a discernible error in the Trial Chamber’s finding that in light of the gravity of the crimes and the position of Kordic as a political leader, his voluntary surrender and his comportment during detention do not warrant mitigation.”

Compare Bralo, (Trial Chamber), December 7, 2005, para. 82: “The Defence has submitted a statement from Tim McFadden, Chief of the United Nations Detention Unit in the Hague, which describes Bralo’s behaviour in detention as good. The Trial Chamber . . . takes [good behavior] into account in the determination of sentence in the present case.” However, “the Trial Chamber gives little weight to [the accused’s good behavior in detention].”

Compare Brđjanin, (Trial Chamber), September 1, 2004, para. 1135: “As regards the submission that the Accused’s conduct while in detention, the Trial Chamber is of the view that all accused are expected to behave appropriately while at the UNDU [United Nations Detention Unit].” *See also Brđjanin*, (Trial Chamber), September 1, 2004, para. 1140 (not listing behavior in the UNDU as a relevant mitigating circumstance).

Compare Deronjic, (Trial Chamber), March 30, 2004, para. 273: “The Trial Chamber . . . takes into account the behaviour and demeanour of Miroslav Deronjic at the UNDU [United Nations Detention Unit]” “However, the Trial Chamber agrees and follows the conclusions reached by the Trial Chamber in *Momir Nikolic*, where it was stated that:

While [comportment in the UNDU] has been recognised as a mitigating factor in numerous cases before this Tribunal, the Trial Chamber recalls that all accused are expected to comport themselves appropriately while at the UNDU; failure to do so may constitute an aggravating factor. Accordingly, this Trial Chamber will not accord significant weight to this factor.”

See also Obrenovic, (Trial Chamber), December 10, 2003, para. 138 (similar conclusion reached regarding Obrenovic); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 168 (similar conclusion reached regarding Momir Nikolic).

Cesic, (Trial Chamber), March 11, 2004, paras. 86, 109: “The Trial Chamber also notes that Ranko Cesic has behaved well in the United Nations Detention Unit and that, on occasion, good behaviour has been considered a mitigating circumstance by the Tribunal, although every detainee is expected to comport himself well in the Detention Unit,” but not listing behavior in detention as a mitigating circumstance taken into account.

(I) advanced age

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 100: “The jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors, such as: the advanced age of an accused However, the Tribunal has generally attached only limited importance to these factors.”

(i) application—advanced age

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 49: “The Appeals Chamber finds that, contrary to the Appellant’s submissions, the Trial Chamber did take into account his age [sixty-nine years as of the March 18, 2004 Trial Chamber decision] as a mitigating factor. . . . The Trial Chamber considered that the age of the Appellant, as well as the fact that he was married with two children, were factors which by themselves did not amount to a mitigating circumstance but which, taken together with the fact that he had been described as a ‘very human and professional officer’ and the fact that he conducted himself well in detention and complied fully with the terms and conditions of his provisional release, did amount to personal circumstances of a kind which might be accorded some, although very limited, weight in mitigation.” See *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 19 (Miodrag Jokic was born on February 25, 1935).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 251: “[T]he Trial Chamber took into consideration two factors mentioned expressly by the Defence, namely, Krnjelac’s teaching career and his age. . . . As for age, the Trial Chamber pointed out that, in sentencing, it had noted: ‘the fact that the Accused, Milorad Krnjelac, is now 62 years of age.’”

Strugar, (Trial Chamber), January 31, 2005, para. 469: “In the view of the Chamber, the Accused’s personal and family circumstances clearly warrant some mitigation of the sentence that would otherwise be appropriate. The Accused is 71 years old and in poor health; he suffers in particular from some degree of vascular dementia and depression and experiences memory losses.”

Jokic - Miodrag, (Trial Chamber), March 18, 2004, paras. 101-102: “The Trial Chamber notes that Miodrag Jokic . . . is almost 69 years old” and considered that, along with other factors “very limited weight in mitigation.”

Plavsic, (Trial Chamber), February 27, 2003, paras. 10, 105, 106: “[T]he Trial Chamber considers that it should take account of the [advanced] age of the accused [seventy-two] and does so for two reasons: First, physical deterioration associated with advanced years makes serving the same sentence harder for an older than a younger accused. Second, . . . an offender of advanced years may have little worthwhile life left upon release.” “[T]he Trial Chamber considers as a mitigating factor the advanced age of the accused.”

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, para. 1099: Under the heading of mitigating factors: “The Trial Chamber also takes into account Miroslav Tadic’s age, 66 years old.”

(m) young age

Mrdja, (Trial Chamber), March 31, 2004, paras. 91, 92: “The Trial Chamber observes that the jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors in sentencing, such as the young age of an accused . . .” “The Trial Chamber also notes that the Tribunal has generally attached only limited importance to these personal factors.”

Banovic, (Trial Chamber), October 28, 2003, para. 75: “The Trial Chamber observes that, in certain cases, age has been considered a relevant factor in mitigation of sentence.”

Blaskic, (Trial Chamber), March 3, 2000, para. 778: “The case-law of the two *ad hoc* criminal Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance. The assessment of youth varies – whilst the ICTY considers accused aged between 19 and 23 at the time of the facts as being young, the ICTR selects ages from 32 to 37.”

(i) application—young age

Simic, Tadic and Zarić, (Trial Chamber), October 17, 2003, para. 1088: “The Trial Chamber takes into account the age of Blagoje Simic at the time he committed the offences, 33 years old.”

Stakic, (Trial Chamber), July 31, 2003, para. 923: “This Trial Chamber takes into account [*inter alia*] the young age of Dr. Stakic at the time he committed the offences [approximately 29-30] . . .”

Jelsic, (Trial Chamber), December 14, 1999, para. 124: “Among the mitigating circumstances set out by the Defence, the Trial Chamber will consider the age of the accused. He is now 31 years old and, at the time of the crimes, was 23. . . . Nonetheless, as indicated by the Trial Chamber hearing the *Furundžija* case, many accused are in that same situation and, in so serious a case, the Judges cannot accord too great a weight to considerations of this sort.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 16: The Trial Chamber held that the combination of [Erdemovic's] young age [23 years when he committed the crimes], evidence that he is “not a dangerous person for his environment,” and “his circumstances and character indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so.”

Compare Cacic, (Trial Chamber), March 11, 2004, para. 91: “The Trial Chamber does not accept the submission of the Defence that the age of Ranko Cacic merits any leniency. The Trial Chamber is not aware of any domestic system where 27 years is treated as a young age and may be considered a mitigating factor. As indicated by the Prosecution,

Ranko Cestic was well beyond the age of majority and he had undertaken military service several years before the offences were committed.”

Compare Mrdja, (Trial Chamber), March 31, 2004, para. 93: “In the present case, the Trial Chamber does not find the age of the accused, being 25 years old when he committed the crimes, to be such a young age that it would justify mitigation.”

Compare Banovic, (Trial Chamber), October 28, 2003, paras. 75, 76: “In this case, the Chamber notes that the Accused was 23 years of age at the time of the offences.” However, the Trial Chamber held that that factor, along with others “cannot play any significant part in mitigating international crimes.”

(n) other personal circumstances/family concerns

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 62: “The Appeals Chamber notes the Trial Chamber’s observation that various personal circumstances have been taken into account as mitigating factors by the jurisprudence of the International Tribunal, but that limited weight had been given to these circumstances by some Chambers. In support of this observation, the Trial Chamber noted the finding in the *Banovic* Sentencing Judgement that ‘many accused share these personal factors.’ Hence, the Trial Chamber only provided a reason as to why, in general, limited weight has been attached in mitigation to factors such as, *inter alia*, the family situation of an accused.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 707: “[T]he International Tribunal has frequently taken into account evidence of personal circumstances when deciding on sentence.”

Kumarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 362: “Family concerns should in principle be a mitigating factor” such as being the father of three young children. *See also Stakic*, (Trial Chamber), July 31, 2003, para. 923 (similar).

Blaskic, (Trial Chamber), March 3, 2000, para. 779: “[I]t [is] appropriate to review the accused’s personal history - socially, professionally and within his family” because these factors “may bring to light the reasons for the accused’s criminal conduct.”

For discussion of Appellate Chamber review of “weight given to personal circumstances,” see Section (X)(e)(xvi)(5), ICTY Digest. See also “weight given to personal circumstances for purposes of provisional release not necessarily relevant to assessing mitigating circumstances,” Section (X)(e)(xvi)(6), ICTY Digest.

**(i) application—other personal circumstances/
family concerns**

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 49: “The Trial Chamber considered that the age of the Appellant, as well as the fact that he was married with two children, were factors which by themselves did not amount to a mitigating circumstance but which, taken together with the fact that he had been described as a ‘very human and professional officer’ and the fact that he conducted himself well in detention and complied fully with the terms and conditions of his provisional release, did amount to personal circumstances of a kind which might be accorded some, although very limited, weight in mitigation.” *See also Jokic-Miodrag*, (Trial Chamber), March 18, 2004, para. 102 (similar).

Babic, (Appeals Chamber), July 18, 2005, para. 77: Rejecting Babic’s argument that personal and family circumstances were not sufficiently considered: “the Trial Chamber properly took into account both the Appellant’s status as a protected witness and the impact of his cooperation on his family when according ‘substantial weight’ to that cooperation as a mitigating factor and concluded that the Trial Chamber correctly assessed these circumstances.” *See also Babic*, (Trial Chamber), June 29, 2004, paras. 88-89 (“The Trial Chamber considers that Babic’s family and personal situation is a mitigating circumstance.”).

Krocka et al., (Appeals Chamber), February 28, 2005, paras. 719-720: “Prcac contends that, in determining his sentence, the Trial Chamber did not take into account his personal circumstances, namely, his age, health problems, family circumstances, past history and assistance to ‘many detainees’ in the Omarska camp.” “The Appeals Chamber observes that the Trial Judgement expressly refers to the assistance provided by Prcac. . . . The Trial Judgement also refers to the personal circumstances of the defendant, . . . taking note of the fact that ‘Prcac is the oldest of the defendants, he is in ill health, and he has two disabled children.’ It is therefore clear that the Trial Chamber took into account the personal circumstances raised by Prcac on appeal.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1090: “The following mitigating circumstances were proved on the balance of probabilities . . . [Cerkez’s] personal and family circumstances.”

Blaskic, (Appeals Chamber), July 29, 2004, paras. 708, 712: “In its finding concerning the personal circumstances of the Appellant, the Trial Chamber noted that several witnesses attested to the professionalism of the accused, that he is a man of duty and a professional soldier of conviction. Furthermore, the Appellant is a father to young children.” “[T]he Appeals Chamber does consider that the particular circumstances of the Appellant at the outset of and during the war deserve consideration. The Appellant has testified that he returned to Bosnia and was appointed to the rank of Colonel (and

commander of the [Central Bosnia Operative Zone]) at the age of 32, his previous positions not having exceeded the rank of company commander, and that he was tasked essentially with establishing the military structure in that area of operations at a time of strategic adversity to defend against Serb aggression.”

Kumarac, et. al., (Appeals Chamber), June 12, 2002, para. 413: “[T]he Appeals Chamber dismisses the appeal of the Appellant Vukovic, except the submission that his family concerns [the fact that he is married and has two children] should be considered as a mitigating factor. However, in the circumstances of this case, which involves a serious offence, this factor does not change the scale of the sentence imposed in the Trial Judgement.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 732: “The Defence for Haradin Bala has emphasized that the Accused was not a person with any commanding or authoritative role in the establishment of the camp, and essentially performed duties assigned to him, as essentially a ‘simple man.’ In an unsworn statement Haradin Bala pointed out that he was the father of a family of seven children and that one of his children requires particular attention because she is paralysed. The evidence also confirms that Haradin Bala is in a poor medical condition. He has for many years experienced problems involving his heart function and blood pressure. The Chamber will take these matters into consideration by way of some mitigation of the sentence. It is also conscious that his prolonged detention will be of hardship for his family, in particular because his daughter requires particular assistance, and is satisfied that his anxiety about his family will make the period the Accused is to serve in custody more difficult for the Accused.”

Strugar, (Trial Chamber), January 31, 2005, para. 469: “In the view of the Chamber, the Accused’s personal and family circumstances clearly warrant some mitigation of the sentence that would otherwise be appropriate. . . . The Accused’s wife, with whom he has been married for 47 years and has two sons, is also in poor health. In particular, she experiences severe vision problems as a result of which she is becoming increasingly dependent on others. She can no longer live on her own and needs an escort to walk. She is currently forced to stay most of the time with either one of her two sons in Belgrade, both of whom are unemployed. In these circumstances, the Chamber is of the view that the absence of the Accused while serving his sentence will be a particular hardship for his wife even though she is receiving some assistance from others. It is satisfied that concern for his wife’s well-being will also make the period spent in custody particularly difficult for the Accused.”

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1129-30: Out of various proposed mitigating factors, the Trial Chamber took into consideration only the accused’s family status and his age.

Mrdja, (Trial Chamber), March 31, 2004, para. 94: “The Trial Chamber accepts that Darko Mrdja was raised under difficult circumstances; that he is now married with two children, one of whom is chronically ill; that he has no ‘prior criminal record,’ and that he has conducted himself well whilst in detention. The Trial Chamber considers that while each of these factors, by itself, does not support any lessening of the sentence, taken together they do amount to personal circumstances of a kind which may be accepted some, although very limited, weight in mitigation.”

See also Banovic, (Trial Chamber), October 28, 2003, para. 82 (taking into account that the Accused is married and has a child); *Simic, Tadic and Zarić*, (Trial Chamber), October 17, 2003, para. 1088 (taking into account that Simic is married and has three young children); *Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 1112 (noting Simo Zarić’s family circumstances); *Stakic*, (Trial Chamber), July 31, 2003, para. 923 (taking into account the young age of Dr. Stakic at the time he committed the offences [approximately 29-30] and the fact that he is married and has two young children); *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 300 (taking into account “the fact that [the Accused] is married and has two children); *Jelic*, (Trial Chamber), December 14, 1999, para. 124 (taking “into account the fact that the accused . . . [inter alia] is the father of a young child, but not according “too great a weight to considerations of this sort.”).

Compare Bralo, (Trial Chamber), December 7, 2005, para. 48: “While prior good character and the family circumstances of an accused may, in some cases, be taken into account as mitigating factors, the Trial Chamber finds that in the present case they have only limited bearing on the sentence to be imposed. . . . [T]he family circumstances of this Accused [his second wife and daughter were tragically killed in a fire in 1998; he also has a son] are of minor relevance to his sentence Therefore, the Trial Chamber notes the mitigating family and personal circumstances of Bralo, but ascribes little weight to them in its determination of sentence.”

Compare Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 855: “The Trial Chamber finds that the evidence presented regarding Dragan Jokic’s family situation merits consideration in mitigation of sentence. Of particular significance is the fact that he is the guardian of his teen-age son. Given the severity of the crimes, however, this factor will not be given undue weight.”

Compare Cestic, (Trial Chamber), March 11, 2004, paras. 90, 92: “While Ranko Cestic’s family background [of having been raised by his mother] may have had an impact on his upbringing, it was not demonstrated that this had such specific impact on Ranko Cestic that it could amount to a mitigating factor. Likewise, the fact that he did not personally gain from the conflict cannot be regarded as a mitigating factor.” “The Trial Chamber is well aware that punishment has an impact on the lives of persons other than the convicted person himself. The relatives of the convicted person, in particular, are likely

to suffer from the consequences of the sentence. However, Ranko Cesic was married on 30 May 2002 in the central prison of Belgrade whilst awaiting transfer to The Hague and this is not a circumstance that should mitigate punishment.”

Compare Obrenovic, (Trial Chamber), December 10, 2003, paras. 139-40: “Dragan Obrenovic is married to an economist and is the father of a six-year old boy. His parents are respectable citizens of Rogatica, Bosnia and Herzegovina, and he has two brothers, a policeman and an electrician.” “The Trial Chamber finds that family circumstances, while recognised as a mitigating circumstance, cannot be given any significant weight in a case of this gravity.”

Compare Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 169-170: “The Nikolic Defence presented the Trial Chamber with factors related to Momir Nikolic’s personal circumstances which it considers relevant to the Trial Chamber’s consideration of an appropriate sentence. Momir Nikolic worked as a teacher in Bratunac and is married with two sons. He took care of his family including his mother who lives with the family. Since Momir Nikolic’s arrest, the costs of living of his family are covered by his wife’s salary as a teacher and his mother’s pension, making the family’s economic situation ‘tense.’” “In determining the appropriate weight to give [family circumstances], the Trial Chamber recalls with approval the finding in the *Finundzija* Trial Judgement in relation to the fact that the accused in that case had no prior convictions and was the father of a young child: ‘this may be said of many accused persons and cannot be given any significant weight in a case of this gravity.’”

(o) poor health

Babic, (Appeals Chamber), July 18, 2005, para. 43: “Poor health is to be considered only in exceptional or rare cases.”

Simic - Milan, (Trial Chamber), October 17, 2002, para. 98: “[I]ssues concerning the ill health of a convicted person should normally be a matter for consideration in the execution of the sentence to be meted out. Hence, it is only in exceptional circumstances or ‘rare’ cases where ill health should be considered in mitigation.”

(i) application—poor health

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 720: “The Trial Judgement . . . refers to the personal circumstances of the defendant, . . . taking note of the fact that [inter alia] ‘ . . . he is in ill health . . . ’ It is therefore clear that the Trial Chamber took into account the personal circumstances raised by Preac on appeal.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 732: “The evidence . . . confirms that Haradin Bala is in a poor medical condition. He has for many years experienced

problems involving his heart function and blood pressure. The Chamber will take [*inter alia*, this matter] into consideration by way of some mitigation of the sentence.”

Strugar, (Trial Chamber), January 31, 2005, para. 469: “In the view of the Chamber, the Accused’s personal and family circumstances clearly warrant some mitigation of the sentence that would otherwise be appropriate. The Accused is 71 years old and in poor health; he suffers in particular from some degree of vascular dementia and depression and experiences memory losses.”

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1099: “The Trial Chamber notes the medical report [of defendant Tadic] submitted on 26 June 2003 indicating poor health.”

(p) assistance to detainees or victims

Bralo, (Trial Chamber), December 7, 2005, para. 59: “The Trial Chamber notes that, in some cases, substantial assistance to, or protection of vulnerable individuals by an accused person may constitute mitigating circumstances. For example, where an accused person participated in the detention of a number of people, and where he assisted some of those detainees, or alleviated their suffering in some way, this may be considered as a factor in mitigation of sentence.”

Cesic, (Trial Chamber), March 11, 2004, para. 78: “The Trial Chamber notes that the jurisprudence of this Tribunal accepts that saving the life or reducing the suffering of victims may mitigate punishment. In the *Sikirica* Judgement, the Trial Chamber found that the alleviation of the appalling conditions of detainees in the Keraterm Camp [in Prijedor] weighed heavily in favour of a substantial reduction in sentence. In the *Krnjelac* Judgement, the Trial Chamber held that the accused’s attempts to secure more food for the detainees, even though it had little practical effect, mitigated his criminality. The Trial Chamber also notes that the *Banosic* Judgement held that assisting some individual detainees in the Keraterm camp mitigated criminality.”

Compare Kvočka et al., (Appeals Chamber), February 28, 2005, para. 693: “[S]elective assistance is ‘less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes.’ It is less decisive still when those victims are assisted because they are known to the accused or they share similar characteristics with the accused. This suggests that they are being helped, not because they are innocent victims, but because the accused considers them to be ‘like’ himself.”

(i) application—assistance to detainees or victims

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 719-720: “Prcac contends that, in determining his sentence, the Trial Chamber did not take into account his . . .

assistance to 'many detainees' in the Omarska camp." "The Appeals Chamber observes that the Trial Judgement expressly refers to the assistance provided by Prcac. . . . It is therefore clear that the Trial Chamber took into account the personal circumstances raised by Prcac on appeal."

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 853: "Dragan Jokic ensured the safe passage through a minefield of a group of Bosnian Muslim boys. The Trial Chamber has assessed this evidence in light of the fact that Dragan Jokic has been convicted for the crime of persecutions, which requires discriminatory intent. The Trial Chamber considers that this act, in the midst of ongoing fighting, merits consideration when arriving at the appropriate sentence. The Trial Chamber will consider it as a mitigating circumstance."

Brđjanin, (Trial Chamber), September 1, 2004, para. 1119: "[O]n a balance of probabilities, the Trial Chamber is satisfied that there is enough to prove that the Accused indeed contributed to the decision to provide shelter to the Bosnian Muslims from Celinac municipality until the situation calmed down." "The Trial Chamber will take this instance in mitigation."

Obrenovic, (Trial Chamber), December 10, 2003, paras. 89, 134: "The Trial Chamber further notes that Dragan Obrenovic tried to convince the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/ Republika Srpska] Main Staff to open the frontline to let [a certain] Muslim column pass through into Muslim territory. Dragan Obrenovic also discussed the opening of a corridor with his Commander Vinko Pandurevic, who eventually ordered the opening of a corridor for around 27 hours in the afternoon of 16 July 1995. Because of the opening of the corridor further heavy fighting was prevented and many members of the ABiH [Muslim Army of Bosnia-Herzegovina] 28th Division and refugees safely reached Muslim-held territory. The Trial Chamber finds that, regardless of his motives, Dragan Obrenovic through his actions spared many lives." "[T]he Trial Chamber finds based on the testimony, that even during the war Dragan Obrenovic provided help on ongoing basis to several Muslims whom he previously had not known. The Trial Chamber finds this a [*sic*] important mitigating factor."

Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1109: "There is some evidence before the Chamber that Simo Zaric attempted to change the course of events. Although this conduct had been taken into consideration in the determination of Simo Zaric's criminal liability, the Trial Chamber feels that some of these acts at the time also ought to be taken into account in mitigation: (1) that in April 1992, Simo Zaric advocated the release of Sulejman Tihic, Witness N, and of Muslim members of the 4th Detachment who had been arrested and were detained at the [Secretariat of the Interior] and TO [Territorial Defence]; (2) that Simo Zaric initiated and organised the transfer of a group of detainees from the TO to the Brcko barracks, which some of the detainees

testified saved their lives; (3) that Simo Zaric, as soon as he heard about the Crkvinia massacre, took steps to report the matter to higher authorities within the Municipality and in Serbia; (4) that Simo Zaric conducted his interrogations humanely in that no beatings accompanied them, and proper records of interviews were made; (5) that Simo Zaric authored the ‘Thirteen Signatories’ Report which documented some of the problems happening at the time, in an attempt to improve the situation.”

Sikirica et al., (Trial Chamber), November 13, 2001, para. 195: “The Chamber has also taken into account the evidence that Dosen, as shift leader, often acted to ameliorate the terrible conditions that prevailed in the Keraterm camp [in Prijedor], in relation to particular detainees. The Chamber considers that Damir Dosen’s acts in this regard constitute a mitigating factor for purposes of sentencing.”

Sikirica et al., (Trial Chamber), November 13, 2001, para. 229: “The Chamber has heard ample evidence of Dragan Kolundzija’s efforts to ease the harsh conditions in the Keraterm camp for many of the detainees. . . . [O]n the basis of the testimony as to his benevolent attitude towards the detainees, Dragan Kolundzija should receive a significant reduction in his sentence.”

**(ii) application—selective/ occasional assistance
given little, if any, weight**

Deronjić, (Appeals Chamber), July 20, 2005, paras. 141, 143: “With respect to the Appellant’s present ground of appeal, the Appeals Chamber finds that the Trial Chamber did not err when it referred to the events which took place after the day of the attack on the village of Glogova. When assessing an accused’s character and behaviour, a Trial Chamber is not limited to consider only facts which took place on the day the offence itself occurred. To correctly assess the character and behaviour of an accused as a mitigating circumstance, a Trial Chamber may take into account any facts established in this regard on a balance of probabilities.” “Accordingly, the Appeals Chamber finds that the Trial Chamber was entitled as it did to balance the fact that the Appellant expelled the volunteers, against the fact that he transferred the people in the hangar pursuant to the plan to forcibly displace them, and could reasonably conclude that the facts concerning the Appellant’s character and behaviour ‘can be seen neither as mitigation [sic] nor as aggravating factors.’”

Krocka et al., (Appeals Chamber), February 28, 2005, para. 693: “The Trial Chamber noted the ‘few occasions’ on which Radic ‘assisted detainees and attempted to prevent crimes,’ but also noted that ‘the vast majority of these instances involved detainees from the town where he had worked as a policeman for 20 years.’ It is thus clear that the Trial Chamber took this mitigating factor into consideration when determining the length of Radic’s sentence. In so considering, the Trial Chamber was entitled to afford as much, or as little, weight to this mitigating factor as it deemed appropriate.”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 679: “Turning to Kvočka’s dismissal from the camp, Kvočka alleges that the reason for his dismissal was his removing his two brothers-in-law from the camp, which, he argues, also subsequently gave rise to feelings of treachery. . . . In the view of the Appeals Chamber, the event underlying all of Kvočka’s arguments is the assistance he rendered to his brothers-in-law. It is apparent that the Trial Judgement took this assistance into account, noting as it did that on a ‘few occasions he assisted detainees and attempted to prevent crimes,’ but that ‘the vast majority of these instances involved relatives or friends.’ No discernible error on the part of the Trial Chamber has thus been shown.”

Bralo, (Trial Chamber), December 7, 2005, para. 59: “The Defence submits that there is evidence that Bralo sheltered and assisted some people in the same time period as his crimes were committed. It provides statements from three people who say they were helped and protected by Bralo in this period. . . . In the present case, of the people who have given statements to the effect that they were helped by Bralo, one states that he and Bralo were old friends, and the others had a family connection to him. The Trial Chamber finds that the fact that he chose to act in this manner with regard to these particular people demonstrates that he was capable of moral action. It does not, however, have any bearing on the sentence that he should receive in punishment for his particular crimes.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 733: “The Chamber has also heard evidence regarding Haradin Bala’s good treatment to some detainees at the Lapushnik/Lapusnik prison camp. Although this evidence shows that he was capable of some benevolence this does not significantly detract from the seriousness of his conduct on the other occasions for which he is to be punished. The occasional assistance to some detainees will not be given much weight.”

Brđjanin, (Trial Chamber), September 1, 2004, para. 1132: “The Trial Chamber accepts that on occasions the Accused spoke openly against war profiteering but attaches little importance to it as it bears little relationship to the plight of the Bosnian Muslims and Bosnian Croats who were not only forcibly displaced but in their great majority, had to hand over their property without compensation to the [Serbian Republic of Bosnia and Herzegovina, later renamed Republika Srpska].”

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 1080: Under the heading mitigating factors: “The Trial Chamber accepts the evidence that Blagoje Simić, through his activities with the Crisis Staff, helped to improve the daily life conditions of some inhabitants of Bosanski Samac, regardless of their ethnicity. This, however, does not detract from the fact that he was actively participating in the persecution of Bosnian Muslims and Croats at the same time.”

For additional situations where there were isolated situations of assistance that were accorded little or no weight in mitigation, see *Brđjanin*, (Trial Chamber), September 1, 2004, paras. 1120-1123, 1126; *Cesic*, (Trial Chamber), March 11, 2004, paras. 79, 87.

Compare Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 266-267: “Although the behaviour of the Accused in the camp was in general extremely cruel, there were some, however limited, positive aspects in his behaviour, which the Trial Chamber will not hesitate to mention. Habiba Hadzic testified about some positive acts by the Accused in [the] Susica camp.” “The Trial Chamber will consider these positive sides of the Accused’s behaviour when finally determining the sentence.”

Compare Obrenovic, (Trial Chamber), December 10, 2003, para. 134: “Based on the evidence presented, the Trial Chamber finds that prior to the war Dragan Obrenovic was a highly respected member of his community who did not discriminate against anybody. Furthermore, the Trial Chamber finds based on the testimony, that even during the war Dragan Obrenovic provided help on ongoing basis to several Muslims whom he previously had not known. The Trial Chamber finds this a[n] important mitigating factor.”

Compare Banovic, (Trial Chamber), October 28, 2003, para. 83: “The Defence has submitted witness statements that indicate that the Accused had assisted some individual detainees when approached with particular requests from relatives and friends. There are also statements that indicate that the Accused helped some Bosnian Muslims and other non-Serb families during the war. Although these acts may not be said to have impacted in any significant way on the welfare of the non-Serb detainees at [the] Keraterm camp in general, they do mitigate the criminality of the Accused.”

Compare Simic, Tadic and Zaric, (Trial Chamber), October 17, 2003, para. 1096: “The Trial Chamber accepts the evidence showing that Miroslav Tadic helped some Bosnian Muslims during the war. Further, although Miroslav Tadic is found to have substantially contributed to exchanges found to constitute deportation, his motives were to help ‘the other side to find their relatives so that the other side would do the same for the Serbs.’”

(q) lack of prior criminal conviction

Brđjanin, (Trial Chamber), September 1, 2004, para. 1127: “This Tribunal has, on several occasions, acknowledged that the previous good character of the convicted person can at times serve in mitigation. It must not be ignored, however, that considering the gravity of crimes that this Tribunal deals with, the instances when this possible mitigating factor can carry significant weight are and ought to be extremely exceptional.”

(i) application—lack of prior criminal conviction

For cases where the lack of a prior criminal conviction is considered a mitigating factor, see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1090; *Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 265; *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, paras. 1089, 1100, 1133.

For a case where the lack of a prior criminal conviction is not considered a mitigating factor, see *Brđjanin*, (Trial Chamber), September 1, 2004, para. 1127.

For cases where the lack of a prior criminal conviction is given very limited weight, see *Mrdija*, (Trial Chamber), March 31, 2004, para. 94; *Banović*, (Trial Chamber), October 28, 2003, para. 76; *Jelić*, (Trial Chamber), December 14, 1999, para. 124.

(r) double jeopardy

(i) application—double jeopardy

Aleksovski, (Appeals Chamber), March 24, 2000, para. 190: In imposing a revised sentence, the Appeals Chamber considered the element of double jeopardy “in that the accused has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress, and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer.”

(s) short period of time during which crimes occurred

(i) application—short period of time during which crimes occurred

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1090: In evaluating mitigating circumstances, the Appeals Chamber noted that as “[o]pposed to the timeframe in the Indictment, [Cerkez’s] criminal responsibility is limited to a relatively short period of time (approximately 14 days).”

Compare Bralo, (Trial Chamber), December 7, 2005, para. 58: “[T]he crimes of which Bralo has been convicted were perpetrated over a period from 15 April 1993, to some time in July 1993, that is, over eleven to fifteen weeks. The Trial Chamber does not consider this to be a short period of time and notes that Bralo has been convicted on the basis of a series of violent and depraved acts, rather than for a single act or set of acts committed on one occasion. The Trial Chamber does not, therefore, attribute any weight to the time period of the Indictment as a mitigating circumstance.”

Compare Stakic, (Trial Chamber), July 31, 2003, para. 917: “The Trial Chamber notes that Dr. Stakic has been convicted of crimes committed during a relatively short time period (April to September 1992). This is not to be regarded as a mitigating factor in view of the large scale of the crimes committed and the long phase of preparation and planning that constitutes an aggravating factor.”

(t) medical condition and intoxication

(i) medical condition

Krocka et al., (Appeals Chamber), February 28, 2005, paras. 704, 706: “Zigic . . . submits that the injury to, and amputation of, his forefinger should be considered a mitigating circumstance.” “It was allegedly the pain resulting from his injury, together with his previous addiction, that also caused him to consume extreme amounts of alcohol.”

“It is the opinion of the Appeals Chamber that the Trial Chamber did not err in its consideration of this matter. The Trial Chamber expressly noted Zigic’s submissions on this ground, *prima facie* proof they were therefore taken into account in determining his sentence. Zigic has not shown the Appeals Chamber anything that would lead it to disturb this presumption. For example, there is no evidence to support the proposition that any pain resulting from Zigic’s injury led to an impairment of his mental state. Further, according to Zigic, the initial injury and amputation occurred on 29 May 1992 and ‘re-amputation’ on 21 June 1992. Yet Zigic has been convicted of offences taking place as late as 5-6 August 1992. Thus, the injury to his finger would not seem to bear any relation to his activities in the camps.”

(ii) voluntary intoxication not a mitigating factor

Krocka et al., (Appeals Chamber), February 28, 2005, para. 707: “The jurisprudence of this Tribunal is clear that voluntary intoxication is not a mitigating factor. In this regard, the Trial Chamber correctly stated:

[W]hen mental capacity is diminished due to use of alcohol or drugs, account must be taken of whether the person subjected himself voluntarily or consciously to such a diminished mental state. While a state of intoxication could constitute a mitigating circumstance if it is forced or coerced, the Trial Chamber cannot accept Zigic’s contention that an intentionally procured diminished mental state could result in a mitigated sentence.”

(iii) “involuntary” intoxication

Krocka et al., (Appeals Chamber), February 28, 2005, para. 708: “On appeal, the argument of Zigic seems to be that his intoxication was in fact involuntary. He claims that the pain resulting from his injury coupled with his previous addiction ‘caused’ his ‘extreme consumption of alcohol.’ The Appeals Chamber notes that Zigic did not plead involuntary intoxication at trial. In any event, as a potential mitigating circumstance, it is

incumbent upon the defendant to prove, on the balance of probabilities, that the consumption of alcohol was indeed involuntary. Zigic did not specify the particular incidents at which he had been under the influence of alcohol either at trial or in his Appeal Brief. He argues neither that he was permanently under the influence of alcohol, nor that his mental powers were impaired by its chronic abuse. Further, the Appeals Chamber notes that he has not presented any evidence to show that his intoxication was in fact involuntary. Zigic has not, therefore, succeeded in discharging his burden.”

(u) character of the accused—generally not a factor to be taken into consideration unless exceptional circumstances

Babic, (Appeals Chamber), July 18, 2005, paras. 49-50: “The Appeals Chamber notes that, while it is correct to say that good character has been recognised as a mitigating circumstance in most cases, this is not a constant practice but instead varies with the circumstances; e.g., in the *Tadic* Sentencing Judgement, the Trial Chamber noted that the Accused was ‘a law abiding citizen and seemingly enjoyed the respect of his community’ and ‘was an intelligent, responsible and mature adult [...] capable of compassion towards and sensitivity for his fellows’ but noted that this, ‘if anything, aggravates more than it mitigates: for such a man to have committed these crimes requires an even greater evil will on his part than for a lesser man.’”

“Even when personal factors or circumstances – including prior good character – have been considered as mitigating circumstances, they have been given little weight in mitigation. In the *Furundzija* Trial Judgement, the Trial Chamber acknowledged that the accused had ‘no previous conviction and [was] the father of a young child’ but noted that ‘this might be said of many accused persons and cannot be given significant weight in a case of this gravity.’ The same approach was taken in the *Jelavic* Trial Judgement. The statement of the Trial Chamber in the present case to the effect that the International Tribunal ‘has jurisdiction over crimes committed during the armed conflict in the former Yugoslavia, where ordinary citizens were involved in horrendous events’ – read in conjunction with the limitation that the prior good character of a convicted person would in isolation only count in mitigation in exceptional circumstances – follows the same line of reasoning.”

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 853: “The Trial Chamber finds that generally the character of an Accused before the crimes were committed is not a factor to be taken into consideration in mitigation of the sentence in crimes of this nature.”

Babic, (Trial Chamber), June 29, 2004, para. 91: “The Tribunal has jurisdiction over crimes committed during the armed conflict in the former Yugoslavia, where ordinary citizens were involved in horrendous events. The Trial Chamber is of the view that the prior good character of a convicted person (understood against a common standard of

behaviour) does not as such count in mitigation, although in exceptional circumstances, for which there is no evidence in this case, it may.”

See also Blaskić, (Trial Chamber), March 3, 2000, para. 780: “The character traits are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused. High moral standards are also indicative of the accused’s character.”

Compare Delalić et al., (Appeals Chamber), February 20, 2001, para. 788: “The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence.”

See also “no error to consider testimony as relevant to cooperation and remorse, not good character,” Section (X)(e)(xvi)(8), ICTY Digest.

(i) application—character of the accused

Babić, (Appeals Chamber), July 18, 2005, para. 51: “The Appellant has not demonstrated an abuse of discretion in this case. Contrary to what he submits, the Trial Chamber did not ‘simply elect [...] to treat the undisputed evidence as an irrelevancy.’ The Trial Chamber did consider the evidence before it [of prior good character] but found that there was no evidence of ‘exceptional circumstances’ and, as a result, held that it did not accept that ‘this proposed ground of mitigation should be given any effect in this case.’ The Appeals Chamber considers that the Trial Chamber was perfectly entitled as it did, in its own words, not to ‘give any effect’ to the Appellant’s prior good character as a factor in mitigation.”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 677: “The Trial Chamber clearly had Kvočka’s personality in mind when sentencing him, since the Trial Judgement notes that ‘[t]he Trial Chamber is also persuaded that Kvočka is normally of good character.’ While no express reference is made to the Expert psychological reports, which Kvočka raises on appeal, the Appeals Chamber reiterates that detailed commentary on each and every piece of evidence taken into consideration is not required. The burden is on the appellant to show that the Trial Chamber made a discernible error; that burden has not been discharged. In the absence of such a showing, the Appeals Chamber will not intervene.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1052: “[T]he Trial Chamber’s convictions and the seriousness of the offences demonstrate that the Trial Chamber did not err in failing to address Kordić’s allegedly good reputation during and after the war.”

Brabić, (Trial Chamber), December 7, 2005, para. 48: “While prior good character and the family circumstances of an accused may, in some cases, be taken into account as

mitigating factors, the Trial Chamber finds that in the present case they have only limited bearing on the sentence to be imposed. Where an accused has been convicted of extremely serious crimes, committed in a particularly brutal manner, the fact that he may have no history of offending does not necessarily militate in favour of a more lenient sentence.”

Babić, (Trial Chamber), June 29, 2004, para. 92: “The Trial Chamber does not accept that this proposed ground of mitigation [prior good character of a convicted person] should be given any effect in this case.”

Banović, (Trial Chamber), October 28, 2003, paras. 75, 76: “Several statements submitted by the Defence attest to the Accused’s good character before the war. Shortly after the beginning of the conflict in Prijedor, the Accused was mobilised into the police force and subsequently assigned as a guard at the Keraterm camp. He was not very experienced and received no training prior to this assignment.” “The Trial Chamber has considered these factors . . . to be relevant in mitigating the penalty. Nevertheless, these factors cannot play any significant part in mitigating international crimes.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1088: “The Trial Chamber does not challenge the truthfulness of the statements on Blagoje Simić’s ‘good character’ and behaviour before the armed conflict. It does not, however, find that such statements are sufficient to counter the fact that at the time for which he stands convicted he exercised discriminatory intent.”

Simić, Tadić and Zarić, (Trial Chamber), October 17, 2003, para. 1099: Under the heading mitigating factors: “The Trial Chamber accepts that the statements submitted by the Tadić Defence show [Tadić’s] prior good character, and notes that Prosecution witnesses also testified to his prior positive personality. The Trial Chamber heard evidence from both Prosecution and Defence witnesses that he was a popular local figure in Bosanski Samac and that people from all ethnicities frequented his café before the armed conflict.”

Stakić, (Trial Chamber), July 31, 2003, para. 926: “The Trial Chamber considers that the substantial volume of evidence given in favour of Dr. Stakić’s personality and family situation merits consideration when arriving at an appropriate sentence. However, this factor will not be given undue weight given the severity of the crimes.”

Compare Blaskić, (Appeals Chamber), July 29, 2004, para. 706: Under the heading “Evidence of the Appellant’s good character as a mitigating factor”: “[T]he Appeals Chamber notes that no evidence has been presented to suggest that the accused is of bad character, and that, to the contrary, several witnesses were at pains to point out the Appellant’s good character, his equitable treatment of Bosnian Muslims both before and during the war and the absence of any bias against or animosity towards Bosnian Muslims, and his professionalism as a soldier. There was also evidence of respect he

engendered in his [Armed Forces of the Government of Bosnia and Herzegovina] opponents.”

Compare Krnojelac, (Appeals Chamber), September 17, 2003, para. 254: “[T]he Trial Chamber took into consideration two factors mentioned expressly by the Defence, namely, Krnojelac’s teaching career and his age. Indeed, the Trial Chamber stated that it had taken into account the fact ‘that, prior to his appointment as warden at the KP Dom [prison complex], the Accused was a person of good character and that, since the termination of his appointment as warden of the KP Dom, the Accused [had] returned to his teaching profession without any suggestion of further criminal conduct on his part.’”

Compare Strugar, (Trial Chamber), January 31, 2005, para. 468: “First, the Chamber takes into consideration the personal circumstances of the Accused. Mrs Katica Strugar, the Accused’s wife, and Lieutenant-Colonel Renko have both testified as to the good character of the Accused and his respect for individuals regardless of their ethnic origin. Lieutenant-Colonel Renko described him as a man of firm, yet humane nature, who likes to help people and respects members of all ethnic groups, and as a commander held in high esteem because he listened to his subordinates and cared about individual soldiers and officers. The Chamber accepts this evidence without reservation. Mrs Strugar, a woman of Serbian and Croatian background, stated that their different ethnic backgrounds were never an obstacle to their life together. She portrayed her husband as a good husband and father who always tried hard to keep the family together although they were forced to move frequently due to his service with the JNA [Yugoslav Peoples’ Army].”

Compare Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 264: Taking into account the personal status of the accused: “The Trial Chamber notes the testimony of Defence witnesses who testified that before the war Dragan Nikolic was a person ‘not inclined to violence’ and causing no incidents. He also associated with persons of all nationalities and religious beliefs. He was a responsible and conscientious worker. As regards his post criminal behaviour, nothing negative has been noted. He was of great help to his mother and provided her with financial support.”

Compare Obrenovic, (Trial Chamber), December 10, 2003, para. 134: “Based on the evidence presented, the Trial Chamber finds that prior to the war Dragan Obrenovic was a highly respected member of his community who did not discriminate against anybody. Furthermore, the Trial Chamber finds based on the testimony, that even during the war Dragan Obrenovic provided help on ongoing basis to several Muslims whom he previously had not known. The Trial Chamber finds this a[n] important mitigating factor.”

Compare Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 164: “The Trial Chamber finds that on the evidence presented, Momir Nikolic did not discriminate prior to the war, and was a respected member of his community. The Trial Chamber finds this a factor in mitigation of sentence.”

Compare Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 1112: “The Trial Chamber accepts the evidence concerning Simo Zaric’s good character.”

(v) serving sentence in foreign country relevant regarding length and location of imprisonment but not a mitigating circumstance

Mrdja, (Trial Chamber), March 31, 2004, paras. 107-108: “The Trial Chamber recognizes that the fact that a convicted person must serve his or her sentence in a state different from the one his or her family resides in and whose language he or she does not speak may constitute an additional hardship.” “The Trial Chamber notes that, when deciding the state where a convicted person shall serve his or her sentence, the International Tribunal does take into consideration his or her personal circumstances. The ‘Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment’ provides that ‘the President of the International Tribunal will, on the basis of the submitted information and on any other inquiries he/she chooses to make, determine the state in which imprisonment is to be served’ and that ‘particular consideration shall be given to the proximity to the convicted person’s relations.’”

(i) application—serving sentence in foreign country

Mrdja, (Trial Chamber), March 31, 2004, paras. 109, 126: “[T]he fact remains that Darko Mrdja will serve his sentence in a state different from his country of origin and at some distance from his wife and children. This is however a common aspect of the prison sentences imposed by the Tribunal. The Trial Chamber takes into account this factor in determining the length of imprisonment, but it does not consider it to be a mitigating circumstance.” “The Trial Chamber also took into consideration the fact that Darko Mrdja must serve his sentence in a foreign country in determining the appropriate sentence, but it did not consider it to be a mitigating circumstance.”

(w) general lack of prejudice

(i) application—general lack of prejudice

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1052: The Trial Chamber did not err in ignoring “Kordic’s submission that he had no prejudice against citizens of other nationalities: as the Trial Chamber correctly convicted him for

persecutions and other crimes committed against Bosnian Muslims, the Appeals Chamber agrees with the Trial Chamber's assessment in not discussing at all manifestly ill-founded submissions."

Krnjelac, (Appeals Chamber), September 17, 2003, para. 255: "[T]he Defence states that the Trial Chamber did not attach the proper weight to the attitude of the witnesses and Muslim detainees towards Krnjelac The Appeals Chamber holds that the Trial Chamber was entitled to find that Krnjelac's attitude [—he attempted to improve the detainees living conditions and where he was personally approached by individual detainees with requests, he did act to help those detainees—] towards non-Serb detainees could not constitute significant mitigating circumstances, bearing in mind its overall assessment of the gravity of Krnjelac's criminal conduct as KP Dom [prison complex] warden over the course of 15 months."

Compare Strugar, (Trial Chamber), January 31, 2005, para. 468: "Mrs Katika Strugar, the Accused's wife, and Lieutenant-Colonel Renko have both testified as to the good character of the Accused and his respect for individuals regardless of their ethnic origin. Lieutenant-Colonel Renko described him as a man of firm, yet humane nature, who likes to help people and respects members of all ethnic groups The Chamber accepts this evidence without reservation. Mrs Strugar, a woman of Serbian and Croatian background, stated that their different ethnic backgrounds were never an obstacle to their life together."

Compare Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 164: "The Trial Chamber finds that on the evidence presented, Momir Nikolic did not discriminate prior to the war, and was a respected member of his community. The Trial Chamber finds this a factor in mitigation of sentence."

(x) protected witness status/ family under witness protection

(i) application—protected witness status/ family under witness protection

Babic, (Appeals Chamber), July 18, 2005, para. 74: "With regard to [Babic's] arguments pertaining to his cooperation, the Appeals Chamber has already found that the Trial Chamber properly took into account his status as a protected witness and the impact that his cooperation had on his family and accordingly gave 'substantial weight' to his cooperation."

Compare Deronjic, (Appeals Chamber), July 20, 2005, paras. 147-149: Where the Trial Chamber failed to find the fact that the Appellant's family was part of a witness protection program was a mitigating factor, even though similar facts were considered in the *Babic Sentencing Judgment*, there was no error because "it was within the Trial

Chamber's discretion in the present case to take the Appellant's family situation into account within the context of his cooperation with the International Tribunal."

(y) length of proceedings/ time lapse between commission of crimes and sentencing

Brdjanin, (Trial Chamber), September 1, 2004, para. 1134: "The length of the Accused's detention at the time of his sentencing will be taken into account as credit towards service of the sentence that will be imposed on him, but not as a mitigating factor."

Compare Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 269-270: "The problem arising from lengthy court proceedings and the long period of time between the criminal conduct and its subsequent trial, has been discussed by the European Court of Human Rights, as well as in decisions of several national courts. Common to all leading decisions is that any disproportionate length of procedures may be considered as a mitigating factor in sentencing." "However, in most of the cases it was held that, in light of Article 6 (1), sentence 1 of the [European] Convention for Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter 'ECHR'), the 'reasonable time' requirement generally comprises solely the time frame starting from the indictment and/or arrest of the accused, and ending with a legally binding, final decision of the court. Moreover, it has been held that the violation of the accused's basic right to a fair and speedy trial should only be remedied and compensated if the perpetrator is not himself responsible for the delay of the proceedings."

(i) application—length of proceedings/ time lapse between commission of crimes and sentencing

Mrdja, (Trial Chamber), March 31, 2004, para. 104: "For crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation."

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 271, 273: "In the present case the Accused was already well informed about the indictment against him at the end of 1994 or beginning of 1995, of course not having any obligation to surrender voluntarily to this Tribunal. The Accused was apprehended by [the Multinational Stabilisation Force (SFOR)] only in the year 2000. Taking into account, *inter alia*, the lengthy period of time necessary for preparing and deciding his motions on jurisdiction, the time spent in the United Nations Detention Unit cannot be regarded as disproportional." "[T]he Trial Chamber concludes that neither the length of time between the criminal conduct and the judgement nor the time between arrest and judgement can be considered as a mitigating factor."

See also "must give credit for time in detention," Section (IX)(c)(vii)(6), ICTY Digest.

(z) lack of strength of character not a mitigating factor

(i) application—lack of strength of character

Banović, (Trial Chamber), October 28, 2003, para. 81: “The Trial Chamber does not consider it appropriate in the present case to mitigate the sentence of the Accused on the basis of his immature and impulsive personality or below average intelligence. Nor does the Trial Chamber accept the argument that the Accused did not have the strength of character to resist the war propaganda. As already stated, the Accused has committed very serious crimes. The Trial Chamber is also satisfied that the Accused voluntarily participated in the mistreatment, beating and killing of detainees at the Keraterm camp [in Prijedor].”

Krnjelac, (Trial Chamber), March 15, 2002, para. 516: “The Trial Chamber does not . . . consider it appropriate . . . to mitigate the sentence of the Accused on the basis that he is the type of person who did not have the strength of character to challenge what he knew to be criminal behaviour by those over whom he had authority in the KP Dom [prison complex in Foca]. The Accused voluntarily accepted this position of authority, and the fact that he may have had difficulties in exercising the authority which that position gave him did not, in the circumstances, mitigate his responsibility.”

(aa) role of war propaganda/ deteriorating political and military situation—not mitigating factors

**(i) application—role of war propaganda/
deteriorating political and military situation**

Blaskić, (Appeals Chamber), July 29, 2004, paras. 710-711: “The Appellant claims that the Trial Chamber erred in its analysis of the mitigating factors by declining to take into account the ‘chaotic’ context in which the acts were allegedly committed.” “The Appeals Chamber considers that the Appellant’s argument is inappropriate. For one thing, it does not demonstrate that the Trial Chamber committed a discernible error in failing to account for the chaotic context of Central Bosnia in 1993. Furthermore, a finding that a ‘chaotic’ context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone. Conflict is by its nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law. While the circumstances in Central Bosnia in 1993 were chaotic, the Appeals Chamber sees neither merit nor logic in recognising the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants.”

Bralo, (Trial Chamber), December 7, 2005, para. 51: “The Trial Chamber is aware of the deteriorating political and military situation in the municipality of Vitez, and indeed in central Bosnia, in the 1992–1993 period. It further notes that tension and animosity

between the Bosnian Croat and Muslim communities in the region escalated in mid-1992, resulting in armed conflict between the [Croatian Defence Council (HVO)] and the army of Bosnia and Herzegovina. The Defence requests that the Trial Chamber be mindful of the ‘enormous pressures placed on many people of good character and of bad character’ in this particular context. While it is notorious that such pressures existed, the Trial Chamber nonetheless finds that they cannot be considered in any way relevant to the sentence to be imposed upon Bralo for the crimes of which he has been convicted. Large sections of the population of Vitez municipality, and indeed of many parts of Bosnia and Herzegovina, were subjected to the same or similar pressures, and yet did not respond in the same manner as Bralo.”

Banović, (Trial Chamber), October 28, 2003, paras. 44, 48: As to the defense claim that the Accused’s participation in the crimes “should be put into the broader context of the aggressive wartime propaganda that was prevalent in the whole territory, particularly in the Prijedor area and the Keraterm camp” and that as a “young, undeducated and immature person, the Accused succumbed to the propaganda,” the Trial Chamber stated: “the role of the war propaganda, clearly does not affect the gravity of the criminal conduct of the Accused and is more appropriately considered in relation to mitigating factors.”

(bb) alleged brutality of arrest not a mitigating factor

Galić (Trial Chamber), December 5, 2003, para. 766: “[T]he Majority of the Trial Chamber considers that the arrest of an accused is not a factor for determining [his] sentence.” See *Galić* (Trial Chamber), December 5, 2003, para. 755 (the defense argued that Galić “was arrested in a ‘brutal’ fashion”).

(cc) not being the sole perpetrator not a mitigating factor

Kročka et al., (Appeals Chamber), February 28, 2005, para. 703: “Zigic argues that since he was not the sole perpetrator in any of the crimes, save for the beating of Hasan Karabasic, this should be treated as a mitigating factor. In the view of the Appeals Chamber, however, the commission of a crime together with other persons in most cases will not be considered less serious than the commission of a crime on one’s own. This does not necessarily mean that participation in a multi-perpetrator offence is an aggravating circumstance, but it can in no way be considered a mitigating factor.”

(dd) anguish experienced during armed conflict not a mitigating factor

Cesic, (Trial Chamber), March 11, 2004, para. 93: “It would be inconsistent with the concept of the crimes under Articles 3 and 5 of the Statute to accept anguish experienced in any armed conflict as a mitigating factor.”

(ee) deterrence not a mitigating factor

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 47: “[I]ndividual deterrence is not a mitigating factor; it instead is a sentencing factor which, when relevant, is considered in imposing a penalty to enhance, but not to reduce, a sentence.”

v) taking account of sentencing practices in the former Yugoslavia

(1) Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 38: “Article 24(1) of the Statute provides that, in determining a sentence, Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.” See also *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 69 (same); *Delalic et al.*, (Appeals Chamber), February 20, 2001, paras. 813 (same). See also *Mrdja*, (Trial Chamber), March 31, 2004, para. 112; *Deronjic*, (Trial Chamber), March 30, 2004, para. 158; *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 148; *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 1068; *Stakic*, (Trial Chamber), July 31, 2003, para. 887 (all invoking Article 24 and Rule 101).

Krstic, (Appeals Chamber), April 19, 2004, paras. 261: “The Trial Chamber was . . . required to consider the sentencing practice in the former Yugoslavia” See also *Kamara, Kovac, and Vokovic*, (Appeals Chamber), June 12, 2002, para. 377 (similar); *Tadic*, (Appeals Chamber), January 26, 2000, para. 21 (similar); *Bralo*, (Trial Chamber), December 7, 2005, para. 84 (similar); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 734 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 473 (similar); *Babic*, (Trial Chamber), June 29, 2004, para. 49 (similar); *Galic*, (Trial Chamber), December 5, 2003, para. 761 (similar).

Blaskic, (Appeals Chamber), July 29, 2004, para. 681: “[T]he Trial Chambers are obliged only to take account of the general practice regarding prison sentences in the courts of the former Yugoslavia.”

(2) general practice regarding prison sentences in the courts of the former Yugoslavia is not binding

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 38: “[T]he International Tribunal has consistently held that ‘recourse’ [to the general practice regarding prison sentences in the courts of the former Yugoslavia] need not be of a binding nature: although a Trial Chamber should ‘take into account’ the general practice regarding prison sentences in the courts of the former Yugoslavia, this ‘does not oblige the Trial

Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.” See also *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, para. 69 (similar); *Delalić et al.*, (Appeals Chamber), February 20, 2001, paras. 813, 816 (similar); *Bralo*, (Trial Chamber), December 7, 2005, para. 84 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 827 (similar); *Brdjanin*, (Trial Chamber), September 1, 2004, para. 1143 (similar); *Mrdja*, (Trial Chamber), March 31, 2004, para. 119 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, paras. 1068, 1074 (similar).

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 17: “In the *Krstić* Appeal Judgement, the Appeals Chamber confirmed that Trial Chambers are not bound by the sentencing practice of the International Tribunal and that such practice is only one of several factors Trial Chambers must consider in determining a sentence. The Appeals Chamber [in *Krstić*] held that the decision of Trial Chambers to consider this factor in its determination of the sentence ‘is a discretionary one, turning on the circumstances of the particular case’ and cited . . . the *Kupreskić* Appeal Judgement that ‘[w]hat is important is that due regard is given to the relevant provision of the Statute and the Rules, [the] jurisprudence of the Tribunal and the ICTR, and the circumstances of the case.’”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1085: “The Appeals Chamber and Trial Chambers have repeatedly held that while the sentencing practices in the former Yugoslavia have to be considered when determining the appropriate sentence, they are not binding upon the International Tribunal.” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 681 (similar); *Krstić*, (Appeals Chamber), April 19, 2004, para. 262 (similar); *Kunarac, Kovac, and Voković*, (Appeals Chamber), June 12, 2002, para. 377 (similar); *Deronjčić*, (Trial Chamber), March 30, 2004, para. 158 (similar); *Cesic*, (Trial Chamber), March 11, 2004, para. 101 (similar); *Obrenović*, (Trial Chamber), December 10, 2003, para. 56 (similar); *Galić*, (Trial Chamber), December 5, 2003, para. 761 (similar); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 96 (same as *Obrenović*); *Stakić*, (Trial Chamber), July 31, 2003, para. 887 (similar).

Kunarac, Kovac, and Voković, (Appeals Chamber), June 12, 2002, para. 377: “It is only where that sentencing practice is silent or inadequate in light of international law that a Trial Chamber may consider an approach of its own.”

Jelić, (Appeals Chamber), July 5, 2001, paras. 116-117: “[T]he Tribunal may be informed in an appropriate case by the sentencing practices of the courts of one or more of the constituent republics of the former Yugoslavia where it has reason to believe that such specific consideration would aid it in appreciating ‘the general practice [. . .] in the courts of the former Yugoslavia.’ The latter phrase is obviously to be taken as a whole; individual divergences from the norm in particular republics do not show the ‘general practice.’” “[G]eneral practice’ provides general guidance and does not bind a Trial Chamber to act exactly as a court of the former Yugoslavia would. For example, even if

the general practice were otherwise, this would not prohibit the imposition of a sentence of life imprisonment; *a fortiori*, it would not stand in the way of a sentence of 40 years' imprisonment."

Brdjanin, (Trial Chamber), September 1, 2004, para. 1144: "[W]hile a Trial Chamber must consider the practice of courts in the former Yugoslavia, its discretion is not curtailed by such practice. However, recourse must be made to it as an aid in determining the sentence to be imposed: an exercise which must go beyond merely reciting the relevant code provisions."

Deronjic, (Trial Chamber), March 30, 2004, para. 170: "[T]he Tribunal, having primacy *vis à vis* national jurisdictions in the former Yugoslavia, is not bound to apply a more lenient penalty – if any – under these jurisdictions. However, such penalties shall be taken into consideration, but as only one factor among others when determining a sentence."

Blaskic, (Trial Chamber), March 3, 2000, paras. 759-760: "Reference to the practice is only indicative and not binding. Whenever possible, the Tribunal examines the texts and relevant judicial practice of the former Yugoslavia. However, it could not be legally bound by them in determining the sentences and sanctions it imposes for crimes falling under its jurisdiction." "[T]he Trial Chamber is not limited by the practice of the courts of the former Yugoslavia and it may draw upon other legal sources in order to determine the appropriate sentence."

See also Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 37: "[T]he Appeals Chamber considers that Trial Chambers are not obliged to consider each and every applicable provision of the laws of the former Yugoslavia."

See also Krstic, (Appeals Chamber), April 19, 2004, para. 261: "The Trial Chamber was entitled to consider, in addition to the SFRY [Socialist Federal Republic of Yugoslavia] law in force at the time of the commission of the crimes by Radislav Krstic, how that law evolved subsequently."

See also Deronjic, (Trial Chamber), March 30, 2004, para. 158: "The Trial Chamber notes that it is difficult to identify such 'general practice' in the absence of a functioning judiciary during the period in question, especially in relation to those crimes heard before this Tribunal. Rather, Trial Chambers should take into account the applicable written law and today's practice – if any – of courts of the States in the territory of the former Yugoslavia in relation to serious violations of International Humanitarian Law." *See also Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 148 (same).

(3) reasons for departure from the sentencing practices in the former Yugoslavia must be explained

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 69: “It follows that Trial Chambers have to take into account the sentencing practices in the former Yugoslavia and, should they depart from the sentencing limits set in those practices, must give reasons for such departure.”

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 69: “The approach of the International Tribunal regarding recourse to the sentencing practice of the former Yugoslavia pursuant to Article 24(1) of the Statute and Rule 101(B)(ii) of the Rules is best expressed in the Judgement of the Trial Chamber in *Kunarac*, as affirmed in the *Krstic* Appeal Judgement:

Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.”

See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1085 (quoting same); *Krstic*, (Appeals Chamber), April 19, 2004, para. 260 (quoting same); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 682 (quoting same); *Bralo*, (Trial Chamber), December 7, 2005, para. 84 (quoting same).

(4) Trial Chambers may impose a greater or lesser sentence than would be applicable under relevant law of the former Yugoslavia

Blaskic, (Appeals Chamber), July 29, 2004, para. 681: “[T]he International Tribunal can impose a sentence in excess of that which would be applicable under relevant law in the former Yugoslavia, and the Appeals Chamber has held that this sentencing practice does not violate the principle of *nulla poena sine lege* because an accused must have been aware that the crimes for which he is indicted are the most serious violations of international humanitarian law, punishable by the most severe of penalties.” See also *Brjanin*, (Trial Chamber), September 1, 2004, para. 1144 (same).

Krstic, (Appeals Chamber), April 19, 2004, para. 262: “The Tribunal is not prevented from imposing a greater or lesser sentence than would have been imposed under the

legal regime of the Former Yugoslavia.” See also *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 734 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 473 (same as *Limaj*); *Banovic*, (Trial Chamber), October 28, 2003, para. 89 (similar).

Tadic, (Appeals Chamber), January 26, 2000, para. 21: “[T]he wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person’s life, itself shows that a Trial Chamber’s discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 827 (similar); *Deronjic*, (Trial Chamber), March 30, 2004, para. 157 (similar); *Obrenovic*, (Trial Chamber), December 10, 2003, para. 56 (similar); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 96 (same as *Obrenovic*).

(5) domestic sentencing practices in countries other than the former Yugoslavia

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 76: “The Appeals Chamber . . . notes that the Trial Chamber, so as to ‘seek guidance’ as it did, was perfectly entitled to undergo a review of the sentencing practices of other countries.” See *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, paras. 166, 172 (the Trial Chamber consulted a Sentencing Report that provided an overview of the law relating to sentencing in 23 other countries).

For a discussion of sentencing laws in countries other than the former Yugoslavia, see *Deronjic*, (Trial Chamber), March 30, 2004, paras. 171-177; *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, paras. 167-173.

But see *Delalic et al.*, (Appeals Chamber), February 20, 2001, para. 758: “The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal’s Statute.”

(6) substance of domestic sentencing law in the former Yugoslavia

For discussion of the sentencing laws in the former Yugoslavia, see *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 1086; *Bralo*, (Trial Chamber), December 7, 2005, paras. 85-88; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 734; *Strugar*, (Trial Chamber), January 31, 2005, paras. 473-475; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, paras. 828-830; *Brdjanin*, (Trial Chamber), September 1, 2004, paras. 1141, 1142; *Babic*, (Trial Chamber), June 29, 2004, para. 49; *Mrdja*, (Trial Chamber), March 31, 2004, paras. 120-121; *Deronjic*, (Trial Chamber), March 30, 2004,

paras. 160-69; *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, paras. 104-111; *Cesic*, (Trial Chamber), March 11, 2004, paras. 102-104; *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, paras. 150-156; *Obrenovic*, (Trial Chamber), December 10, 2003, paras. 57-60; *Galic*, (Trial Chamber), December 5, 2003, para. 761; *Nikolic - Momir*, (Trial Chamber), December 2, 2003, paras. 97-100, 127-128; *Banovic*, (Trial Chamber), October 28, 2003, para. 89; *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, paras. 1069-1073; *Stakic*, (Trial Chamber), July 31, 2003, paras. 888-889.

(7) applicability of the principle of *lex mitior* (if the law relevant to the offense has been amended, the less severe law should apply)

(a) *lex mitior* constitutes an internationally recognized standard

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 161: “[T]he Trial Chamber finds that the principle of *lex mitior* as contained in, *inter alia*, the International Covenant on Civil and Political Rights [ICCPR] of 1966 and the American Convention on Human Rights of 1978 constitutes such an internationally recognized standard regarding the rights of the accused. Article 15 paragraph 1 sentence 3 of the ICCPR states that:

If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

See also *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 162: “This principle [of *lex mitior*] also forms part of the criminal law applicable in [Bosnia and Herzegovina] throughout the relevant period. . . .”

(b) *lex mitior* requires the more lenient law apply if the law has been amended

Deronjic, (Appeals Chamber), July 20, 2005, para. 96: “The principle of *lex mitior* is understood to mean that the more lenient law has to be applied if the laws relevant to the offence have been amended.” See also *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 81 (similar).

(c) the amended law must be binding

Deronjic, (Appeals Chamber), July 20, 2005, para. 97: “With respect to the applicability of the principle of *lex mitior* to the relationship between the law of the International Tribunal and the law relevant for the national courts of the former Yugoslavia, the Appeals Chamber . . . reiterates its finding in the *Dragan Nikolic* Sentencing Appeal Judgement:

It is an inherent element of [the] principle [of *lex mitior*] that the relevant law must be binding upon the court. Accused persons can only benefit from the

more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.”

See also *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, para. 81 (same quoted language).

**(d) *lex mitior* is inapplicable regarding the law of the ICTY
and national courts**

Deronjic, (Appeals Chamber), July 20, 2005, para. 98: “As the International Tribunal is not bound by the law or sentencing practice of the former Yugoslavia, the principle of *lex mitior* is not applicable in relation to those laws.”

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, paras. 84-85: “The Appeals Chamber . . . reiterates its finding that the International Tribunal, having primacy, is not bound by the law or sentencing practice of the former Yugoslavia. It has merely to take it into consideration. Allowing the principle of *lex mitior* to be applied to sentences of the International Tribunal on the basis of changes in the laws of the former Yugoslavia would mean that the States of the former Yugoslavia have the power to undermine the sentencing discretion of the International Tribunal’s judges. In passing a national law setting low maximum penalties for the crimes mentioned in Articles 2 to 5 of the International Tribunal’s statute, States could then prevent their citizens from being properly sentenced by this Tribunal. This is not compatible with the International Tribunal’s primacy enshrined in Article 9(2) of the Statute and its overall mandate.”

“In sum, properly understood, *lex mitior* applies to the Statute of the International Tribunal. Accordingly, if ever the sentencing powers conferred by the Statute were to be amended, the International Tribunal would have to apply the less severe penalty. So far as concerns the requirement of Article 24(1) that ‘the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia,’ these words have to be construed in accordance with the principles of interpretation applicable to the Statute of which they form part. So construed, they refer to any pertinent laws of the former Yugoslavia which were in force at the time of commission of the crime in question; subsequent changes in those laws are not imported.”

Nikolić - Dragan, (Trial Chamber), December 18, 2003, para. 165: “[T]he Tribunal, having primacy *vis à vis* national jurisdictions in the former Yugoslavia, is not bound to apply the more lenient penalty under these jurisdictions.”

vi) prior sentencing practices of the ICTR and ICTY

(1) prior sentencing practices of the ICTR and ICTY—may be of assistance, but offer limited guidance

Babic, (Appeals Chamber), July 18, 2005, para. 32: “As previously noted in the *Dragan Nikolic* case, the precedential effect of previous sentences rendered by the International Tribunal and the ICTR is not only ‘very limited’ but ‘also not necessarily a proper avenue to challenge a Trial Chamber’s finding in exercising its discretion to impose a sentence.’” See also *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 9 (source of quoted language).

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 681: “Sentences of like individuals in like cases should be comparable and, in this regard, the Appeals Chamber ‘does not discount the assistance that may be drawn from previous decisions rendered.’” However, “while comparison with other sentences may be of assistance, such assistance is often limited. For these reasons, previous sentences imposed by the Tribunal and the ICTR are but one factor to be taken into account when determining the sentence.”

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, paras. 14-16: “In the *Furundzija* Appeal Judgement, the Appellant contended that his sentence should have been reduced to a length of time consistent with the emerging penal regime of the International Tribunal. The Appeals Chamber held that it was at the time ‘premature to speak of an emerging penal regime’ and concluded that it was ‘inappropriate to establish a definitive list of sentencing guidelines for future reference.’”

“[I]n the *Celebici* [a/k/a *Delalic*] Appeal Judgement, . . . [w]hile both parties urged the Appeals Chamber to compare their case with other cases that had been the object of final consideration, the Appeals Chamber held the following:

[A]s a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.” (emphasis in original)

“[S]imilar cases do not provide ‘a legally binding tariff of sentence but a pattern which emerges from individual cases’ and that ‘[w]here there is such a disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and the Rules.”

Krstic, (Appeals Chamber), April 19, 2004, para. 248: “The conclusion of the Appeals Chamber in the *Jelavic* case, as well as in others, is unequivocal: The sentencing practice of the Tribunal in cases involving similar circumstances is but one factor which a

Chamber must consider when exercising its discretion in imposing a sentence. The decision is a discretionary one, turning on the circumstances of the particular case. ‘What is important is that due regard is given to the relevant provisions of the Statute and the Rules, [the] jurisprudence of the Tribunal and ICTR, and the circumstances of the case.’”

Furundžija, (Appeals Chamber), July 21, 2000, para. 237: “It is . . . premature to speak of an emerging ‘penal regime,’ and the coherence in sentencing practice that this denotes. It is true that certain issues relating to sentencing have now been dealt with in some depth; however, still others have not yet been addressed. [A]t this stage, it is not possible to identify an established ‘penal regime.’ Instead, due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case.”

Nikolić - Dragan, (Trial Chamber), December 18, 2003, para. 174: “Since its establishment, the Tribunal has rendered more than twenty judgements, of which some are pending on appeal. The scale of sentences has been very broad as each case has its own merits and deserves to be considered individually.”

Nikolić - Momir, (Trial Chamber), December 2, 2003, para. 138: “[T]he Trial Chamber finds that the comparison to the crimes committed by others is not appropriate . . .”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1075: “The Trial Chamber notes that a range or pattern of sentences within the Tribunal does not exist as yet.”

(2) factors for why different sentences might be imposed for the same type of crime

Furundžija, (Appeals Chamber), July 21, 2000, paras. 249-250: “In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. ‘[T]he sentence imposed must reflect the inherent gravity of the accused’s criminal conduct.’” “The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules.”

(3) comparing sentences only appropriate where offenses are the same and committed in substantially similar circumstances

Babić, (Appeals Chamber), July 18, 2005, para. 32: “[C]omparison [between cases] can only be undertaken where the offences are the same and committed in substantially similar circumstances[.]” “[A] Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime.”

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 9: “The reason for [the fact that comparisons with other sentences by the ICTR and ICTY offer only very limited guidance] is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances, when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime, with due regard to the entirety of the case, as the triers of fact.”

Jelić, (Appeals Chamber), July 5, 2001, para. 101: “[I]t is generally not useful to compare one case to another unless the cases relate to the same offence committed in substantially similar circumstances.”

Delalić et al., (Appeals Chamber), February 20, 2001, paras. 756-757: “One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice.” “This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to consider that range or pattern of sentences, without being bound by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal’s administration of criminal justice.” “At the present time, therefore, in order to avoid any unjustified disparity, it is possible for the Tribunal to have regard only to those sentences which have been imposed by it in generally similar circumstances as to both the offences and the offenders. It nevertheless must do so with considerable caution. [C]omparisons with sentences imposed in other cases will be of little assistance unless the circumstances of the cases are substantially similar.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 1075: “The Appeals Chamber held that a Trial Chamber may only have regard to sentences pronounced in other cases before the Tribunal in substantially similar circumstances.”

(4) no sentencing guidelines or ranges

Đerongjić, (Trial Chamber), March 30, 2004, para. 151: “Neither the Statute nor the Rules specify a concrete range of penalties for offences under the Tribunal’s jurisdiction. *See also Nikolić - Dragan*, (Trial Chamber), December 18, 2003, para. 141 (same).

Nikolić - Momir, (Trial Chamber), December 2, 2003, para. 56: “The Tribunal does not have . . . sentencing guidelines. Rather, as will be discussed in detail below, a Trial Chamber has the discretion to determine the appropriate sentence based on the criminal conduct of an accused.”

Stakić, (Trial Chamber), July 31, 2003, para. 928: “As stated, the Statute, Rules and jurisprudence of this Tribunal do not expressly lay down a range or scale of sentences applicable to the crimes falling under its jurisdiction. The decision has been left to the discretion of the Trial Chamber in each case and the guidance that may be found in the final sentence imposed in previously decided cases is extremely limited.”

(5) a sentence should not be capricious or excessive/ must not be out of reasonable proportion with other sentences passed in similar circumstances for the same offence

Babić, (Appeals Chamber), July 18, 2005, para. 33: “In the *Jelić* case, in addressing the appellant’s arguments to the effect that he was given a sentence in excess of those rendered in other cases, the Appeals Chamber held the following:

The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules.”

See also Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 1064 (similar); *Jelić*, (Appeals Chamber), July 5, 2001, para. 96 (source of quoted language).

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 681: “[T]he Appeals Chamber has observed that a sentence may be considered ‘capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences.’ The underlying question is whether the particular offences, the circumstances in which they were committed, and the individuals concerned can truly be

considered 'like.' Any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual. Often, too many variables exist to be able to transpose the sentence in one case *mutatis mutandis* to another. . . .”

Delalić et al., (Appeals Chamber), February 20, 2001, para. 757: “[I]n cases involving similar factual circumstances and similar convictions, particularly where the sentences imposed in those other cases have been the subject of consideration in the Appeals Chamber, there should be no substantial disparity in sentence unless justified by the circumstances of particular accused.”

(6) application—comparing sentence with those in other ICTY and ICTR cases

(a) comparing various other cases

See Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 680, 682-683 (rejecting Kvočka’s argument that comparison with the *Celebić* [a/k/a *Delalić*], *Aleksovski*, and *Krnjelac* cases leads to the conclusion that his sentence should be significantly reduced); *Kvočka et al.*, (Appeals Chamber), February 28, 2005, paras. 694-696 (rejecting Radic’s argument that his sentence is disproportionate to others imposed by the Tribunal); *Krstić*, (Appeals Chamber), April 19, 2004, paras. 249-250 (rejecting Krstić’s argument that the Trial Chamber erred by failing to consider carefully the ICTR jurisprudence relating to sentencing). *See also Vasićević*, (Appeals Chamber), February 25, 2004, paras. 150-152; *Brulo*, (Trial Chamber), December 7, 2005, para. 93; *Limaj et al.*, (Trial Chamber), November 30, 2005, paras. 735-736 (all rejecting similar arguments).

See also Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 20 (rejecting the argument that the court failed to follow “a ‘clear and unambiguous’ pattern of sentencing” where the “Appellant did not attempt to compare his case with one or more cases comprising the same offence and substantially similar circumstances.”).

(b) comparing one other case

See Babić, (Appeals Chamber), July 18, 2005, para. 33 (rejecting comparison to sentence imposed in one other case); *Strugar*, (Trial Chamber), January 31, 2005, para. 464 (same).

But see Simić, Tadić, and Zarić, (Trial Chamber), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, October 17, 2003, para. 39 (arguing that because Stevan Todorović, Chief of the Police in Bosanski Samac, was sentenced to ten years imprisonment, Simić should only be sentenced to 7 years).

(c) comparing co-defendants

See Krocka et al., (Appeals Chamber), February 28, 2005, para. 697 (rejecting Radic's argument that his sentence was excessive when compared to the sentences of his co-defendants; the Appeals Chamber found that the crimes of which the co-defendants were convicted and those of Radic were not "alike").

Compare Krstic, (Appeals Chamber), April 19, 2004, para. 254: "The Appeals Chamber . . . agrees that the comparative guilt of other alleged co-conspirators, not adjudicated in this case, is not a relevant consideration. The Appeals Chamber does not, however, share the Prosecution's interpretation of the Trial Judgement. The Trial Chamber was entitled to consider the conduct of Krstic in the proper context, which includes the conduct of any alleged co-perpetrators. A comprehensive understanding of the facts of a particular case not only permits a consideration of the culpability of other actors; indeed, it requires it in order to accurately comprehend the events in question and to impose the appropriate sentence."

vii) miscellaneous principles regarding sentencing

(1) sentence must be individualized/ reflect individual guilt

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 1087: "The individual guilt of each Accused limits the range of the sentence. Other goals and functions of a sentence can only influence the range within the limits that are defined by the individual guilt." *See also Deronjic*, (Trial Chamber), March 30, 2004, para. 136 (similar); *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 123 (same as *Deronjic*); *Stakic*, (Trial Chamber), July 31, 2003, para. 899 (same as *Deronjic*).

Jelisić, (Appeals Chamber), July 5, 2001, para. 101: "[T]he sentence imposed by the Trial Chamber must be individualized . . ."

Babic, (Trial Chamber), June 29, 2004, para. 100: "The Trial Chamber considers that each sentence must be viewed in the light of the circumstances of the particular case and that the sentences imposed on other convicted persons by this Tribunal are based on premises that may differ from the circumstances of the present case."

Obrenovic, (Trial Chamber), December 10, 2003, para. 62: "[T]he Appeals Chamber has stressed that the sentence should be individualised and that the particular circumstances of the case are therefore of primary importance." *See also Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 102 (same).

Obrenovic, (Trial Chamber), December 10, 2003, para. 46: "In this case, as in all cases before the Tribunal, the Trial Chamber is called upon to determine a sentence for an

individual, based on his particular conduct and circumstances.” *See also Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 83 (similar).

(2) no individual should be punished for criminal conduct of others

Obrenovic, (Trial Chamber), December 10, 2003, para. 46: “No individual should be punished for the criminal liability of others and no case should be viewed as representing the final accounting for a particular crime – especially crimes such as those committed following the fall of Srebrenica for which numerous people may be held criminally liable; each person must only be called to answer, and be punished, for his particular share of the criminal activity. Individual accountability for the crimes committed and commensurate punishment is the aim of criminal proceedings involving such grave crimes. Each case is part of a *process*, of which the Tribunal itself is only one part. This process, on one level promotes the re-establishment of the rule of law and crime prevention, and on another, reconciliation and peace through justice.”

Obrenovic, (Trial Chamber), December 10, 2003, para. 152: “Without diminishing in any way the criminal conduct of Dragan Obrenovic, the Trial Chamber recalls that he is not alone in bearing criminal responsibility for the massive crimes committed against the Bosnian Muslim population. He did not conceive of the murder operation [subsequent to the fall of Srebrenica]. His punishment must reflect only *his* role and participation in the crime of persecutions. Others, who should one day face judgement before this Tribunal, will accordingly be judged and sentenced for *their* roles.”

(3) proportionality to be taken into account in sentencing

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 16: “In the *Jelusic* case, the Appeals Chamber recognised that a sentence ‘may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences.’”

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 21: “As correctly noted by the Trial Chamber, the principle of proportionality implies that ‘[a] sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.’” *See also Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 144 (same); *Deronjic*, (Trial Chamber), March 30, 2004, para. 154 (same).

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 21: “The Appeals Chamber finds that the principle of proportionality, in the Trial Chamber’s consideration, means that the punishment must be ‘proportionate to the moral blameworthiness of the offender’ and requires that ‘other considerations such as deterrence and societal

condemnation of the acts of the offender' be taken into account. The principle of proportionality referred to by the Trial Chamber by no means encompasses proportionality between one's sentence and the sentence of other accused. . . . It appears that the Appellant misunderstands what the principle of proportionality encompasses."

Deronjic, (Trial Chamber), March 30, 2004, para. 139: "[T]he fundamental principle of proportionality has to be taken into account [regarding sentencing]." See also *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 126 (same).

Compare Simic, Tadic, and Zaric, (Trial Chamber), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, October 17, 2003, para. 38: "In sentencing, proportionality usually means reaching a reasonable balance between the gravity of the offence and the punishment to be meted out. This is proportionality on the individual level. But there are other instances or relations in which proportionality is of importance, namely, (i) the proportionality between punishments meted out in different cases, (ii) between punishments meted out to several defendants in one case, and (iii) between a punishment already meted out and another or others to be meted out in the same case."

(a) application—proportionality

Deronjic, (Trial Chamber), Dissenting Opinion of Judge Schomburg, March 30, 2004, paras. 2, 5: "The sentence is not proportional to the crimes it is based on The Accused [who pled guilty to individual responsibility for persecution as a crime against humanity involving the attack on the village of Glogova to facilitate the removal of Bosnian Muslims from the Municipality of Bratunac, resulting in, *inter alia*, 64 Muslim civilian deaths] deserves a sentence of no less than twenty years of imprisonment." "[T]he heinous and long planned crimes committed by a high ranking perpetrator do not allow for a sentence of only ten years, which may possibly even be a *de facto* deprivation of liberty of only six years and eight months, taking into account the possibility of an early release."

(4) discretion to impose concurrent, consecutive, a mixture of concurrent and consecutive, or single sentence, but must reflect "totality" of the criminal conduct

Blaskic, (Appeals Chamber), July 29, 2004, paras. 717-718: "As to whether the International Tribunal is competent to impose a single sentence, the Appeals Chamber has regard to Rule 101 of the Rules as it was at the time the Trial Judgement was rendered, which the Trial Chamber decided did not preclude the passing of a single sentence for several crimes. In the *Celebici* [a/k/a *Delalic*] Appeal Judgement, the Appeals Chamber held that 'a single global sentence . . . appears to have been

contemplated by the Rules at that time,⁷ that is, before Rule 87(C) came into force. The Appeals Chamber considers that the International Tribunal was competent, by virtue of the then Rule 101, to impose a single sentence, and it retains such competence by virtue of Rule 87(C)."

"However, this competence [to impose a single sentence] does not entitle the International Tribunal to impose a single sentence arbitrarily; due consideration must be given to each particular offence in order for its gravity to be determined, and for a reasoned decision on sentence to be provided. . . ."

Mucic et al., (Appeals Chamber), April 8, 2003, para. 46: "[S]entencing in relation to more than one offence involves more than just an assessment of the appropriate period of imprisonment for each offence and the addition of all such periods so assessed as a simple mathematical exercise. The total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender's criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or they must be ordered to be served either concurrently or partly concurrently."

Delalic et al., (Appeals Chamber), February 20, 2001, paras. 428-430: "If . . . a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently." "It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive. In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate." "[T]he overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber."

Brdjanin, (Trial Chamber), September 1, 2004, paras. 1148-1149: "Rule 87(C) provides that:

If the Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

“The Appeals Chamber in the *Blaskić* case has recently established that this competence of the Trial Chamber to impose a single sentence does not entitle it to impose a single sentence arbitrarily. Due consideration must be given to each particular offence in order for the gravity to be determined and for a reasoned decision on sentence to be provided and in particular it should be ensured that if imposed, a single sentence must reflect the totality of the criminal conduct in question.”

(a) application—discretion to impose concurrent, consecutive, a mixture of concurrent and consecutive, or single sentence, but must reflect “totality” of the criminal conduct

Blaskić, (Appeals Chamber), July 29, 2004, paras. 721, 723: “It is wrong to hold, as the Trial Chamber did, that ‘it is impossible to identify which acts would relate to which of the various counts – other than those supporting the prosecution for and conviction of persecution under count 1.’ Where it is impossible to identify which acts would relate to which of the various counts, it is likewise impossible to arrive at distinct convictions. Either an accused person is guilty of different crimes constituted by different elements which may sometimes overlap (but never entirely), or the accused is convicted of that crime with the most specific elements, and the remaining counts in which those elements are duplicated are dismissed as impermissibly cumulative.”

“The Appeals Chamber finds that the reasoning of the Trial Chamber with respect to the imposition of a single sentence fails to respect the requirements that the Trial Chamber was obliged by Rule 87 of the Rules to meet, namely either to impose a sentence in respect of each finding of guilt, or to impose a single sentence reflecting the totality of the criminal conduct of the accused. It is clearly established that the International Tribunal is competent to impose a single sentence, but that single sentence must reflect the totality of the criminal conduct in question.”

Brđanin, (Trial Chamber), September 1, 2004, para. 1150: “The Trial Chamber pursuant to Rule 87(C) decides to impose a single sentence in this case, as it reflects better the criminal conduct of the Accused which shows a constant pattern of criminal behaviour occurring within a closed temporal context.”

Galić, (Trial Chamber), December 5, 2003, para. 768: “[I]n view of the fact that General Galić is guilty of crimes which form part of a single campaign committed in a geographically limited territory over an uninterrupted period of time, the Majority of the Trial Chamber holds it preferable to impose a single sentence [of twenty years].” *But see Galić*, (Trial Chamber), Separate and Partially Dissenting Opinion of Judge Nieto-Navia, December 5, 2003, paras. 122, 123 (“In my view, the Majority . . . does not sufficiently consider the difficulty faced by the Accused in conducting a war in the urban environment of Sarajevo. To repeat the words of a UN representative posted in Sarajevo during the conflict, the dense military presence within a civilian population

made the conduct of such a war ‘a soldier’s worst nightmare.’” “I would sentence General Galic to ten years’ imprisonment.”)

See also Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 54: “In determining an appropriate sentence to reflect the full extent of Miodrag Jokic’s culpability, the Trial Chamber has taken into consideration the fact that some of the crimes to which he pleaded guilty [murder; cruel treatment; unlawful attack on civilians; devastation not justified by military necessity; unlawful attack on civilian objects; and destruction or willful damage to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science] contain identical legal elements, proof of which depends on the same set of facts, and were committed as part of one and the same attack on the Old Town of Dubrovnik.” Jokic was sentenced to seven years imprisonment.

(5) Trial Chamber has discretion to impose life imprisonment; death penalty not available

Blaskic, (Appeals Chamber), July 29, 2004, para. 678: “The Appeals Chamber recalls that Article 24(1) of the Statute limits the penalty imposed by the Trial Chamber to imprisonment.”

Jelisić, (Appeals Chamber), July 5, 2001, para. 100: “[I]t falls within the Trial Chamber’s discretion to impose life imprisonment.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 723: “A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.”
See also Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 30 (similar).

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 147: “Rule 101 (A) of the Rules . . . grants the power to imprison for a term up to and including the remainder of the convicted person’s life. . . .”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 172: “In line with the general UN policy on the abolition of the death penalty, the Security Council limited the applicable sentences to imprisonment. Acting pursuant to Article 15 of the Statute, the Plenary of this Tribunal specified Article 24 (1) of the Statute by phrasing Rule 101 of the Rules in its relevant part: ‘A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.’”

Stakic, (Trial Chamber), July 31, 2003, para. 890: “The maximum sentence that may be imposed by the Tribunal is life imprisonment. Both the United Nations and the Council of Europe, as well as other international bodies, have been working towards total abolition of the death penalty. In 1989, the second optional Protocol to the [sic] CCPR aiming at the abolition of the death penalty was adopted by the UN General Assembly.

The Council of Europe requires all countries seeking membership to place a moratorium on the death penalty, effectively meaning that in Europe it has almost been completely abolished. For this reason the death penalty can no longer be imposed in states of the former Yugoslavia and has been replaced by the maximum penalty of life imprisonment except where a lower maximum is specified. Where a penalty becomes more lenient, the more lenient version must be applied. This means that if the SFRY Criminal Code were applied today, the maximum penalty would be life imprisonment. The Trial Chamber notes that in many countries the possibility of a review of a life sentence exists under certain conditions.”

(6) must give credit for time in detention

Blaskic, (Appeals Chamber), July 29, 2004, para. 709: “Rule 101(C) of the Rules states: ‘Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.’ The Appeals Chamber in the *Tadic* case held that ‘fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal’s formal request for deferral.’ The Appeals Chamber considers that any time spent in custody for the purpose of this case must necessarily be taken into account.”

Tadic, (Appeals Chamber), January 26, 2000, paras. 38, 75: “Under Sub-rule 101(D) the Appellant is entitled to credit for the time spent in custody in the Federal Republic of Germany only for the period pending his surrender to the International Tribunal. However, the Appeals Chamber recognises that the criminal proceedings against the Appellant in the Federal Republic of Germany emanated from substantially the same criminal conduct as that for which he now stands convicted at the International Tribunal. Hence, fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal’s formal request for deferral.”

Deronjic, (Trial Chamber), March 30, 2004, para. 281: “Pursuant to Rule 101(C) of the Rules, ‘credit shall be given to the convicted person for the period [...] during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.’” *See also Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 283 (same); *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 850 (similar).

Compare Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 850: A trial chamber “must order any sentence to run from the date of Judgement. . . .”

(a) application—credit for time in detention

See Bralo, (Trial Chamber), December 7, 2005, para. 96 (Bralo entitled to credit for time in detention); *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 737 (Limaj entitled to credit); *Strugar*, (Trial Chamber), January 31, 2005, para. 476 (Strugar entitled to credit); *Jokic - Miodrag*, (Trial Chamber), March 18, 2004, para. 115 (Jokic entitled to credit); *Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 182 (Nikolic entitled to credit); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, paras. 1127-1129 (Simic, Tadic and Zaric entitled to credit).

(7) Trial Chamber may recommend that a minimum sentence be served before any commutation or sentence reduction

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 95: “Although neither the Statute nor the Rules provide that Trial Chambers have the discretion to recommend a minimum sentence, the Appeals Chamber has previously held that such discretion ‘flows from the powers inherent in its judicial function and does not amount to a departure from the Statute and the Rules.’ Accordingly, the Appeals Chamber finds that a Trial Chamber may determine what it considers to be the minimum term of imprisonment an accused should serve.”

Krstic, (Appeals Chamber), April 19, 2004, para. 274: “As the Appeals Chamber explained in the *Tadic* Judgement in Sentencing Appeals, the decision whether to impose a minimum sentence is within the sentencing Chamber’s discretion. The imposition of a minimum sentence is ordered only rarely. In the absence of compelling reasons from the Prosecution as to why it should do so, the Appeals Chamber does not believe that a minimum sentence is appropriate in this case.”

Bralo, (Trial Chamber), December 7, 2005, para. 94: “With regard to the imposition of a mandatory minimum sentence, the Trial Chamber notes that, while it may choose to recommend a minimum term of imprisonment to be served by Bralo, this has occurred only rarely in cases before the Tribunal. Article 28 of the Statute and Rules 123, 124 and 125 of the Rules provide for a procedure whereby the State in which a convicted person is serving his sentence must notify the Tribunal of the eligibility of the convicted person for early release, and the President of the Tribunal then determines whether such release is appropriate, taking into account the considerations specified in Rule 125. Therefore, when a Trial Chamber sentences a convicted person to a certain number of years’ imprisonment, it does so in the awareness that there is a possibility of early release under the law of whatever State the sentence is served in, but also that the President of this Tribunal ultimately determines the matter. In the circumstances of the present case, the Trial Chamber finds it unnecessary to make a recommendation on the minimum sentence to be served by Bralo before he should be eligible for early release.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 850: A trial chamber “may recommend a minimum sentence to be served by an accused before any commutation or reduction of sentence is considered.”

(8) error to assume early release when calculating sentence

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, paras. 94-95, 97: “The Appeals Chamber notes that nothing in the Statute or the Rules of the International Tribunal provides that an accused has to serve the time recommended by the Prosecution to be granted early release. Pursuant to Rule 125 of the Rules, the period of time that an accused will actually serve in detention, as opposed to the sentence imposed in a Judgement, is dependent upon a certain number of factors pertaining to ‘*inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.’ Under the International Tribunal’s law, eligibility for early release is dependant on the applicable law of the State in which the convicted person is imprisoned, which State shall notify the International Tribunal of such eligibility. Ultimately, the President determines, in consultation with the members of the sentencing chamber and the Bureau, whether or not early release should be granted.”

... “A Trial Chamber may also consider the possibility that an accused be granted early release when determining what constitutes an appropriate sentence. Nevertheless, a Trial Chamber must always consider that early release is only a possibility offered to a convicted person provided that the above mentioned conditions are met. It is for example conceivable that a convicted person’s character, even though possibly showing a potential for reintegration at the time of sentencing, evolves to the contrary while serving his sentence.”

“The Appeals Chamber notes that the Trial Chamber, by imposing a sentence of 23 years, clearly – although not expressly – entered into a calculation to reflect the practice of the International Tribunal of granting early release after the convicted person has served two-thirds of his sentence: the term of 15 years clearly amounts to two-thirds of the sentence it effectively rendered. The Appeals Chamber considers that the Trial Chamber mechanically – not to say mathematically – gave effect to the possibility of an early release. By doing so, it attached too much weight to the possibility of an early release. As a consequence, the Appeals Chamber (Judge Shahabuddeen dissenting) finds that a reduction of sentence shall be granted.” (emphasis in original)

But see Nikolic - Dragan, (Appeals Chamber), February 4, 2005, Partial Dissenting Opinion of Judge Shahabuddeen, paras. 21, 22 (disagreeing with the majority approach).

But see Deronjic, (Trial Chamber), Dissenting Opinion of Judge Schomburg, March 30, 2004, para. 5: “[T]he heinous and long planned crimes committed by a high ranking perpetrator do not allow for a sentence of only ten years, which may possibly even be a

de facto deprivation of liberty of only six years and eight months, taking into account the possibility of an early release.”

X) MISCELLANEOUS

a) General considerations regarding legal interpretation

i) sources of law when interpreting substantive criminal norms in the Statute

Stakić, (Trial Chamber), July 31, 2003, para. 414: “[W]hen interpreting the relevant substantive criminal norms of the Statute, the Trial Chamber has used previous decisions of international tribunals, the primary source being judgements and decisions of this Tribunal and the Rwanda Tribunal, and in particular those of the Appeals Chamber. As a secondary source, the Trial Chamber has been guided by the case-law of the Nuremberg and Tokyo Tribunals, the tribunals established under Allied Control Council Law No. 10, and the Tribunal for East Timor.”

For discussion of the *Erdemović* case, and the use of policy as a possible fall-back option, see Section (VII)(b), ICTY Digest.

For discussion of “interpretive sources” for construing the crime of genocide, see Section (III)(b)(iii), ICTY Digest.

ii) tribunal bound to apply treaty law

Galic, (Trial Chamber), December 5, 2003, para. 98: “The Appeals Chamber has said ‘that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.’”

(1) appropriate to interpret conventions in conformity with the Vienna Convention on the Law of Treaties

Stakić, (Trial Chamber), July 31, 2003, para. 411: “The Chamber has . . . deemed it appropriate to interpret any relevant convention in conformity with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969.”

See also Galic, (Trial Chamber), December 5, 2003, para. 91: “Article 31(1) of the 1969 Vienna Convention on the Law of Treaties [provides] that ‘A treaty shall be interpreted

in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ No word in a treaty will be presumed to be superfluous or to lack meaning or purpose.”

iii) crimes covered by Articles 2 to 5 of the Statute reflect customary international law

Stakić, (Trial Chamber), July 31, 2003, para. 411: “[T]he Trial Chamber observes that . . . the norms laid down in Articles 2 to 5 of the Statute reflect customary international law . . .”

For additional holdings that the crimes within the Statute reflect customary international law, *see, e.g.*, regarding the crime of genocide, “definition reflects customary international law and *jus cogens*,” Section (III)(b)(ii), ICTY Digest; “joint criminal enterprise is customary international law,” Section (V)(e)(i)(2), ICTY Digest; “command responsibility is customary international law,” Section (VI)(b)(i), ICTY Digest.

iv) the principle *nullum crimen sine lege* requires that the Tribunal only convict where the offense was proscribed under customary international law when committed

Blaskić, (Appeals Chamber), July 29, 2004, para. 141: “The principle of *nullum crimen sine lege* is, *inter alia*, enshrined in Article 15 of the International Covenant on Civil and Political Rights adopted on 16 December 1966 (ICCPR) and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR). In a decision on an interlocutory appeal in the *Hadžibasanović* case, the Appeals Chamber stated that ‘it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed.’ Thus, while the Statute of the International Tribunal lists offences over which the International Tribunal has jurisdiction, the Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law at the time of its commission.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 78: “The jurisdiction *ratione materiae* of the International Tribunal is circumscribed by customary international law, and the International Tribunal cannot impose criminal responsibility for acts which, prior to their being committed, did not entail such responsibility under customary international law.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 86: “[T]he principle of *nullum crimen sine lege* . . . in addition to prohibiting a conviction without a concise definition of an alleged

crime, also prohibits a conviction entered in excess of the statutory or generally accepted parameters of the definition.”

Galic, (Trial Chamber), December 5, 2003, paras. 92, 93: “The Majority . . . acknowledges the importance of the principle found in Article 15 of the 1966 International Covenant on Civil and Political Rights, which states, in relevant part: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.’”

“The principle (known as *nullum crimen sine lege*) is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. In practice this means ‘that penal statutes must be strictly construed’ and that the ‘paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object.’ Moreover:

The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 220: “[A] conviction can only be based on an offence that existed at the time the acts or omissions with which the accused is charged were committed and which was sufficiently foreseeable and accessible.”

Stakic, (Trial Chamber), July 31, 2003, para. 411: “[T]he Trial Chamber has considered carefully the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993) according to which ‘the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law.’”

b) Fair trial rights

i) presumption of innocence

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 833: “[T]he accused enjoys the benefit of the presumption of innocence.”

Halilović, (Trial Chamber), November 16, 2005, para. 12: “Article 21(3) of the Statute provides that the Accused shall be presumed innocent until proven guilty.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 10 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 18 (same); *Nikolić - Momir*, (Trial Chamber), December 2, 2003, para. 148 (similar).

Strugar, (Trial Chamber), January 31, 2005, para. 5: “Article 21(3) of the Statute enshrines the presumption of innocence to which each accused is entitled.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 19: “Pursuant to Article 21(3) of the Statute, the Accused are entitled to a presumption of innocence, which entails a corollary burden on the Prosecution to establish each and every element of the offences charged against the Accused.”

(1) Prosecution bears the burden of proof to establish guilt beyond reasonable doubt

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 833: “The Appeals Chamber finds that the standard of proof to be applied from the point of view of a trier of fact is beyond a reasonable doubt, and the burden of proof lies on the Prosecution . . .” *See also Krstić*, (Appeals Chamber), April 19, 2004, para. 81 (similar); *Vasićević*, (Appeals Chamber), February 25, 2004, para. 120 (similar); *Simić, Tadić, and Zarić*, (Trial Chamber), October 17, 2003, para. 19 (“Pursuant to Rule 87 (A) the standard of proof required is guilt beyond reasonable doubt”).

Limaj et al., (Trial Chamber), November 30, 2005, para. 10: “This presumption [of innocence] places on the Prosecution the burden of establishing the guilt of the Accused, a burden which remains on the Prosecution throughout the entire trial. In respect of each count charged against each Accused, the standard to be met for a conviction to be entered is that of proof beyond reasonable doubt.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 5 (similar).

Halilović, (Trial Chamber), November 16, 2005, para. 12: “The Prosecution . . . bears the burden of establishing the guilt of the Accused, and, in accordance with Rule 87(A) of the Rules, the Prosecution must do so beyond reasonable doubt. In determining whether the Prosecution has done so with respect to the Count in the Indictment, the Trial Chamber has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused. Any ambiguity or doubt has been resolved in favour of the Accused in accordance with the principle of *in dubio pro reo* [essentially, giving the defendant the benefit of the doubt].” *See also Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 18 (same); *compare Stakić*, (Trial Chamber), July 31, 2003, para. 416: “The Trial Chamber explicitly distances itself from the Defence submission that the principle *in dubio pro reo* should apply as a principle for the

interpretation of the substantive criminal law of the Statute. As this principle is applicable to findings of fact and not of law, the Trial Chamber has not taken it into account in its interpretation of the law.”

(2) Accused’s decision to testify does not alter the burden of proof

Limaj et al., (Trial Chamber), November 30, 2005, para. 22: “Th[e] decision [of Fatmir Limaj] to testify has not created any burden on the Accused to prove his innocence. Rather, the Chamber had to determine whether, notwithstanding the evidence of the Accused, the Prosecution’s evidence is sufficiently strong to meet the required standard for a conviction.”

(3) Accused’s failure to dispute that crime occurred does not alter the burden of proof

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 289: “[T]he Appeals Chamber considers that the fact that Kvočka did not dispute at trial that torture occurred in the camp did not relieve the Prosecution of its obligation to prove the crimes of torture it specifically alleged in the Indictment and that Kvočka incurred criminal responsibility for each of them beyond reasonable doubt.”

(4) Accused’s reliance on the alibi defense does not alter the burden of proof

Limaj et al., (Trial Chamber), November 30, 2005, para. 11: “So long as there is a factual foundation in the evidence for th[e] alibi, the Accused bears no onus to establish that alibi; it is for the Prosecution to ‘eliminate any reasonable possibility that the evidence of alibi is true.’ Further, as has been held by another Trial Chamber, a finding that an alibi is false does not in itself ‘establish the opposite to what it asserts.’ The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment.”

For discussion of the “alibi defense,” see Section (VII)(a), ICTY Digest.

(5) considering mitigating factors agreed to in plea agreement does not violate the burden of proof

Jokić - Mićodrag, (Appeals Chamber), August 30, 2005, paras. 40, 47: “The Appellant alleges that the Trial Chamber erred in law in deciding that, in the case of plea agreements, it would primarily rely on mitigating factors agreed upon by the parties since mitigating factors should be established by a defendant on the balance of probabilities and not by agreement between the parties.” “The Appeals Chamber is not satisfied that

the Trial Chamber wrongly departed from the ‘balance of probabilities’ standard set out in the *Celebici* [a/k/a *Delalić*] Appeal Judgement. Having recalled the standard in question, the Trial Chamber stated that, in cases of plea agreements, it would primarily rely on the mitigating factors agreed to by the parties. In other words, the Trial Chamber logically relieved the Appellant from discharging the burden of establishing mitigating circumstances on the balance of probabilities with respect to those mitigating circumstances agreed upon by the parties. Further, . . . the Trial Chamber considered mitigating factors that the Appellant alone had identified.”

For discussion of the “balance of probabilities” burden of proof for establishing mitigating factors, see (IX)(c)(iv)(1)(c)(ii), ICTY Digest.

ii) right to remain silent/ right against self-incrimination

Limaj et al., (Trial Chamber), November 30, 2005, para. 22: “[T]he Chamber recalls Article 21(4)(g) of the Statute which provides that no accused shall be compelled to testify against him or herself” See also *Halilović*, (Trial Chamber), November 16, 2005, para. 13 (similar); *Strugar*, (Trial Chamber), January 31, 2005, para. 11 (similar); *Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 19 (similar).

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 148: “[U]nder the Statute of the Tribunal, an accused has the right to . . . not be compelled to confess guilt.”

(1) there is an absolute prohibition against consideration of silence in the determination of guilt or innocence

Delalić et al., (Appeals Chamber), February 20, 2001, para. 783: “Neither the Statute nor the Rules of this Tribunal expressly provide that an inference can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not ‘be a consideration in the determination of guilt or innocence.’ Should it have been intended that such adverse consequences could result, . . . an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore . . . an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules. . . .”

(2) addressing sentencing as part of closing does not violate right against self-incrimination

Brđjanin, (Trial Chamber), September 1, 2004, paras. 1077, 1081: “The Defence objects to the application of Rule 86(C) which requires parties to address sentencing matters in closing arguments. According to the Defence, this Rule is manifestly unfair to the Accused and therefore requests, in the event of a finding of guilt, a separate sentencing

hearing so that it can present evidence of remorse as a mitigating factor.” “The Trial Chamber does not agree with the Defence submission that as a result of the application of Rule 86(C) the Accused is forced to give up his right against self-incrimination in order to present evidence relevant to his sentencing. The Appeals Chamber has categorically stated that an accused can express sincere regret without admitting his participation in a crime. The Trial Chamber fully agrees and notes that Rule 84bis(A) even provides for an accused to make a statement without a solemn declaration and without having to face cross-examination. The Trial Chamber is satisfied that the Statute and the Rules of this Tribunal guarantee due process rights to all accused. The Trial Chamber, therefore, dismisses the Defence objection and proceeds with its sentencing considerations.”

iii) right to a fair and public trial

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 148: “[U]nder the Statute of the Tribunal, an accused has the right to a fair and public trial”

The right to a fair trial encompasses various other rights. For discussion of the “right to be given adequate time and facilities for the preparation of the defense,” see Section (X)(b)(iv), ICTY Digest. For discussion of the “right to an appeal,” see Section (X)(b)(v) and “appellate review,” Section (X)(d)(ii), ICTY Digest. For discussion of the “right of an accused to a fair trial/denial of due process” (Rule 68 disclosure obligations), see Section (X)(b)(vi), ICTY Digest. For discussion that a “reasoned opinion in writing [is] required,” see Section (X)(d)(ii)(6), ICTY Digest. See also “rights waived by pleading guilty,” Section (X)(f)(iii)(2)(a), ICTY Digest.

iv) right to be given adequate time and facilities for the preparation of the defense

Blaskic, (Appeals Chamber), July 29, 2004, para. 208: “Article 21(4)(b) requires that an accused be given ‘adequate time and facilities for the preparation of his defence’”

(1) “equality of arms” principle

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 175-177: “The principle of equality of arms falls within the guarantee of a fair trial provided by the Statute, and has been described as obligating a judicial body to ensure that neither party is put at a disadvantage when presenting its case. The Appeals Chamber, in considering the scope for application of the principle, has held that at a minimum ‘a fair trial must entitle the accused to adequate time and facilities for his defence’ under conditions which do not place him at a substantial disadvantage as regards his opponent.”

“The Appeals Chamber has in the past given a broad interpretation to the principle of equality of arms. In this case, the Appeals Chamber has already, prior to this

appeal, had occasion to consider the principle, and held that the ‘principle of equality of arms is described as being only one feature of the wider concept of a fair trial.’ Nevertheless, the right of an accused to have adequate time and facilities to prepare his or her defence does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material equality of financial or personal resources. The right to equality of arms is not a right to equality of relief. Likewise, the Chambers are not obliged to regulate conditions beyond the control of the International Tribunal, and its application to the International Tribunal’s procedures recognises the ‘peculiar difficulties under which [the] parties have to operate.’ Only when the moving party has shown ‘good cause’ may it be granted relief under that principle.” “Kordic has failed to do so in this instance.”

Tadic, (Appeals Chamber), July 15, 1999, paras. 43, 44, 48, 52. Article 20(1) of the Statute provides that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious . . .” and “equality of arms means that each party must have a reasonable opportunity to defend its interests ‘under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent.’” The Appeals Chamber held that “the principle of equality of arms falls within the fair trial guarantee under the Statute.” “[U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”

v) right to an appeal

Aleksovski, (Appeals Chamber), March 24, 2000, para. 104: “The right of appeal is a component of the fair trial requirement.”

For a discussion of appellate review standards and practices, see “appellate review,” Section (X)(d)(ii), ICTY Digest.

vi) right of an accused to a fair trial/denial of due process

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 119: “Where a party

alleges on appeal that the right to a fair trial has been infringed, it must prove that the protections provided by the Statute, together with the Rules, were not extended to it by the Trial Chamber. This requires the alleging party to prove

- (1) that provisions of the Statute and/or the Rules were violated, and
- (2) that the violation caused prejudice or 'unfairness' to the alleging party, such as to amount to an error of law invalidating the Trial Judgement."

For further discussion of additional requirements of fair trials, see, e.g.: the "right to be given adequate time and facilities for the preparation of the defense," Section (X)(b)(iv), ICTY Digest; the "right to an appeal," Section (X)(b)(v), ICTY Digest; "the right of an accused to have like cases treated alike," discussed in Section (X)(d)(i)(1), ICTY Digest, and "appellate review," Section (X)(d)(ii), ICTY Digest.

(1) Rule 68 disclosure obligations essential for fair trials

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 242: "The Appeals Chamber has emphasised that the right of an accused to a fair trial is a fundamental right protected by the Statute and by the Rules. Rule 68, imposing disclosure obligations on the Prosecution, is an important shield in the accused's possession. . . . The Appeals Chamber reiterates that the onus on the Prosecution to enforce the rules rigorously to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute."

Blaskić, (Appeals Chamber), July 29, 2004, para. 264: "The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute. Indeed, the rationale behind Rule 68 was discussed by the *Blaskić* Trial Chamber which held that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution. . . ."

Krstić, (Appeals Chamber), April 19, 2004, para. 211: "The right of an accused to a fair trial is a fundamental right, protected by the Statute, and Rule 68 is essential for the conduct of fair trials before the Tribunal."

See also *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 183: "The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute."

(a) Rule 68 applies to any material known to the Prosecution that suggests the innocence or mitigates the guilt of the Accused, or evidence that may affect the credibility of Prosecution evidence

Blaskić, (Appeals Chamber), July 29, 2004, para. 263: “Rule 68 of the Rules provides, under the heading ‘Disclosure of Exculpatory Material’:

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.”

See also Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 178 (quoting Rule 68).

Krstić, (Appeals Chamber), April 19, 2004, para. 204: “The scope of Rule 68 is clear: It applies to any material known to the Prosecution that either suggests the innocence or mitigates the guilt of the accused, or evidence that may affect the credibility of Prosecution evidence.”

(b) the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution’s discretion

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 183: “[T]he rationale behind Rule 68 is that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution, and that the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution’s discretion. The Prosecution is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution’s evidence. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution. The general practice of the International Tribunal is to respect the Prosecution’s function in the administration of justice, and the Prosecution’s execution of that function in good faith.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 264 (similar).

(c) disclosure required even if there exists other information of a generally similar nature

Blaskić, (Appeals Chamber), July 29, 2004, paras. 265-266: “Regarding the manner in which the Prosecution should discharge the obligation provided for in Rule 68, the Appeals Chamber is aware that a broad interpretation of Rule 68 imposes upon the Prosecution a burdensome duty, as held in the *Krstić* Appeal Judgement:

... [t]he Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope ... [.]”

“In line with this broad interpretation of Rule 68, the Appeals Chamber reiterates that it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for in Rule 68 if there exists other information of a generally similar nature.”

(d) evidence called *proprio moto* by a Trial Chamber does not relieve the Prosecution of its disclosure obligations

Krstić, (Appeals Chamber), April 19, 2004, para. 204: “The Appeals Chamber does not accept that evidence called *proprio moto* by a Trial Chamber can relieve the Prosecution of its obligation under Rule 68 in relation to that evidence.”

(e) material of a public character

Blaskić, (Appeals Chamber), July 29, 2004, para. 296: “Arguably, the Prosecution’s duty to disclose does not encompass material of a public nature potentially falling under Rule 68, for example, Exhibits 16 and 25. However, a distinction should be drawn between material of a public character in the public domain, and material reasonably accessible to the Defence. The Appeals Chamber emphasizes that unless exculpatory material is reasonably accessible to the accused, namely, available to the Defence with the exercise of due diligence, the Prosecution has a duty to disclose the material itself.”

(f) continuing obligation to monitor witness testimony and disclose material relevant to impeachment

Blaskić, (Appeals Chamber), July 29, 2004, para. 301: “The Appeals Chamber recalls that the *Krstić* Appeal Judgement held that:

Rule 68 *prima facie* obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.”

Krstić, (Appeals Chamber), April 19, 2004, para. 206: “The Prosecution’s obligation to disclose under Rule 68 is a continuing obligation, precisely because the relevance to the case of certain material held by the Prosecution may not be immediately clear. Rule 68 *prima facie* obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the

amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.”

(g) duty of the Prosecution to disclose exculpatory material arising from related cases

Blaskic, (Appeals Chamber), July 29, 2004, para. 302: “[T]he Appeals Chamber stresses the duty of the Prosecution to disclose exculpatory material arising from other related cases. The Appeals Chamber emphasizes that the Office of the Prosecutor has a duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Rule 68 to determine whether any material has to be disclosed.”

For discussion of Kordić’s argument that the non-disclosure of Blaskić’s open-session and closed-session testimony in Blaskić’s case violated Rule 68, see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 197-201.

(h) obligation to disclose continues after the Trial Chamber judgment throughout proceedings before the Appeals Chamber

Blaskic, (Appeals Chamber), July 29, 2004, para. 267: “The Appeals Chamber emphasises that indeed, the Prosecution’s obligation to disclose exculpatory evidence pursuant to Rule 68 continues after the trial judgement has been rendered in a case and throughout proceedings before the Appeals Chamber. This duty is a continuous obligation without distinction as to the public or confidential character of the evidence concerned.”

(i) test to apply: whether the Prosecution violated its Rule 68 obligations, and whether material prejudice resulted

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 179, 182: “The test to be applied for disclosure under Rule 68 comprises two steps. First, if the Defence believes that the Prosecution has not complied with Rule 68, it must establish that additional evidence exists that might prove exculpatory or mitigating for the accused, and is in the possession of the Prosecution. Second, it must present a *prima facie* case making out the probable exculpatory or mitigating nature of the materials sought. Once the Defence has satisfied a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any), must examine whether or not the Defence has been prejudiced by a breach of Rule 68, and may now decide pursuant to Rule 68*bis*.” “There is no requirement on the Prosecution to certify that it has met its disclosure obligations, and it is not for the Appeals Chamber to impose such a requirement.” See also *Blaskic*, (Appeals Chamber), July 29, 2004, para. 268

(similar).

Krstić, (Appeals Chamber), April 19, 2004, para. 153: “As a general proposition, where the Defence seeks a remedy for the Prosecution’s breach of its disclosure obligations under Rule 68, the Defence must show (i) that the Prosecution has acted in violation of its obligations under Rule 68, and (ii) that the Defence’s case suffered material prejudice as a result. In other words, if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal - in addressing the aspect of appropriate remedies - will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate.”

(j) establishing that prejudice occurred

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 242: “It is clearly established that proof of prejudice to an accused is required before a remedy under Rule 68 can be given, but that burden on the alleging party cannot serve to isolate violations of the Rule to the detriment of a fair trial.”

Blaskić, (Appeals Chamber), July 29, 2004, paras. 268, 295: “If the Defence satisfies a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber in addressing what is the appropriate remedy, has to examine whether or not the Defence has been prejudiced by a breach of Rule 68 and rule accordingly pursuant to Rule 68bis.”

“The Appeals Chamber reiterates that proof of prejudice is a requirement for a remedy sought on appeal for a violation of Rule 68, and recalls the *Blaskić* 26 September 2000 Decision whereby it considered that relief for a violation of the Prosecution’s obligations pursuant to Rule 68 would not necessarily be granted if the existence of the relevant exculpatory material is known and the material is accessible to the Appellant, as the Appellant would not be materially prejudiced by this violation.”

(k) delays in disclosure may occur

Blaskić, (Appeals Chamber), July 29, 2004, para. 300: “The Appeals Chamber acknowledges that due to the fact that the materials in possession of the Prosecution, and/or in the custody of the Registry are so voluminous, delays in disclosure to the Defence may occur. It is often difficult for the various organs within the International Tribunal to access documents. Indeed, the voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded.”

(1) difficulties encountered in tracing and gaining access to evidence in the territory of the former Yugoslavia: disclosure must be as soon as practicable

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 208-210: “The Appeals Chamber has been consistently mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia, where some States ‘have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal.’

The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case.”

“The Appeals Chamber concludes that [where] the Prosecution has sufficiently accounted for its own conduct in this regard, that [certain] material was disclosed ‘as soon as practicable’ in accordance with Rule 68, and . . . Kordić and Cerkez have failed to demonstrate that the Prosecution’s disclosure of the . . . materials constituted a breach of its obligations under Rule 68,” “Kordić’s argument is accordingly rejected on this basis.”

Cf. Blaskić, (Appeals Chamber), July 29, 2004, para. 4: “This long appeal has, in part, been characterized by the filing of an enormous amount of additional evidence. This was *inter alia* due to the lack of cooperation of the Republic of Croatia at the trial stage and to the delay in the opening of its archives, which only occurred following the death of former president Franjo Tuđman on 10 December 1999, thus preventing the parties from availing themselves of the materials contained therein at trial.”

(2) application—the right of an accused to a fair trial/denial of due process, including Rule 68 disclosure obligations

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 121: On Appeal, “Cerkez argues that his trial was unfair for the following reasons: the Trial Chamber’s denial of his request for at least four weeks to prepare his Final Trial Brief; the Prosecution’s pattern of both late and new disclosure, due in part to the Prosecution’s tactics designated as an ‘ambush’ of the defence, and constituting misuse of the disclosure process to frustrate defence work; inability to examine documents known to exist in the archives of Bosnia and Herzegovina, and which favoured his case, in violation of Rule 68 of the Rules.” For discussion of alleged vagueness of the indictment, inadequate notice of the charges, and the Prosecution’s case as a “moving target,” see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 122-172. For discussion of the Prosecution’s alleged violations of its disclosure obligations under Rule 68, see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 178-243.

For discussion that there was no error of law for the Trial Chamber to disallow extra time for filing a brief, see *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 196.

Additionally, for particular findings as to whether Rule 68 disclosure obligations were violated see, e.g., *Blaskić*, (Appeals Chamber), July 29, 2004, paras. 270-303; *Krstić*, (Appeals Chamber), April 19, 2004, paras. 154-215.

For discussion of remedies where Rule 68 is violated, see, e.g., *Krstić*, (Appeals Chamber), April 19, 2004, paras. 211-215.

vii) right to an independent and impartial tribunal/ fair and public hearing

(1) two-pronged test for challenges to judicial impartiality

Furundžija, (Appeals Chamber), July 21, 2000, paras. 189-190: “[T]here is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. [T]he Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

- i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or
- ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”

“In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the ‘reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.’”

(2) high threshold required to rebut the presumption of impartiality

Furundžija, (Appeals Chamber), July 21, 2000, para. 197: “[I]n the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal ‘can disabuse their minds of any irrelevant personal beliefs or predispositions.’ It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the judge] was not impartial in his case. There is a high threshold to reach in order to rebut the

presumption of impartiality. “[D]isqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be firmly established.”

(3) qualifications that play an integral role in satisfying eligibility requirements do not, in the absence of the clearest contrary evidence, show bias or impartiality

Furundzija, (Appeals Chamber), July 21, 2000, para. 205: “The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements.” “Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.”

(4) application—disqualification

(a) Judge Mumba’s acting as a representative on the United Nations Commission on the Status of Women not grounds for disqualification

Furundzija, (Appeals Chamber), July 21, 2000, paras. 200-202: In evaluating whether Judge Mumba’s acting as a representative of her country on the United Nations Commission on the Status of Women (UNCSCW) was grounds for disqualification regarding a case involving rape, the Appeals Chamber stated: “even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSCW . . . in promoting and protecting the human rights of women, that inclination . . . is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women. [E]ven if Judge Mumba sought to implement the relevant objectives of the UNCSCW, those goals merely reflected the objectives of the United Nations, and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal.” “‘Concern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape.’ To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.”

**(b) Judge Benito's membership on the Board of Trustees of
the United Nations Voluntary Fund for the Relief of
Victims of Torture not grounds for disqualification**

Delalic et al., (Appeals Chamber), February 20, 2001, paras. 697-699, 707: In dismissing the defendants' appeal that Trial Judge Odio Benito should be disqualified because of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture, the Appeals Chamber stated: "[t]he relevant question to be determined . . . is . . . whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold in the solemn declaration made when assuming office, that he or she will perform the duties and exercise the powers of such an office 'honourably, faithfully, impartially and conscientiously.' [B]y accepting a position on the Board of Trustees, Judge Odio Benito undertook in her personal capacity to further the mandate of the Victims of Torture Fund. . . . As noted in the *Furundžija* Appeal Judgement, personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality. The Appeals Chamber has already emphasised that, as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be 'firmly established.' The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias."

**(c) judges not disqualified from hearing two or more trials
arising out of the same series of events**

Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2 (Bureau Decision), May 4, 1998, (Trial Chamber), May 21, 1998: "[I]t is a fundamental right of all persons facing criminal charges to be tried before an independent and impartial tribunal. [T]he Tribunal is guided by the principle that the requirement of impartiality prohibits not only actual bias or prejudice, but also the appearance of partiality. Thus, where the circumstances create a reasonable or legitimate suspicion of prejudice, there may be a basis for disqualification though in fact no actual bias or prejudice exists. However . . . it does not follow that a judge is disqualified from hearing two or more criminal trials arising out [of] the same series of events, where he is exposed to evidence relating to these events in both cases. A judge is presumed to be impartial. The nature of the Tribunal's jurisdiction is such that the cases before it inevitably overlap. On the one hand, the same issues and the

same evidence are often involved. On the other hand, the Tribunal possesses a finite number of judges.”

(d) alleged unintentional bias against Serbs

Brđjanin, (Trial Chamber), September 1, 2004, paras. 42-43: In response to the defense argument that “there is a danger that the Trial Chamber’s deliberations may be informed by an unintentional bias against Serbs, as a result of ‘the nature of the allegations raised not only in this trial but in other cases before this Tribunal and in the international press and community,’” the Trial Chamber held that the defense submission was “misconceived and unfortunate.” “[T]he Trial Chamber does not need to be ‘challenged’ or reminded to decide the case against the Accused on the basis of the law as it stood at the time relevant to the Indictment and on the evidence before it. It is its duty to do so, and the Judges of the Trial Chamber, being professional judges, are constantly aware of this duty. Article 21(2) of the Statute guarantees the Accused a ‘fair and public hearing’ It is the duty of the Trial Chamber to decide what, if any, is the individual criminal responsibility to be ascribed to an accused, irrespective of nationality, religion, ethnicity or other grounds.”

“The Tribunal functions on the basis of a presumption of impartiality of any judge sitting on the bench. Whilst the Accused is entitled to challenge this impartiality, the Defence has not advanced any grounds that would substantiate or justify such challenge, while at the same time it presents this concern about anti-Serb bias as a ubiquitous one. For this reason, the Trial Chamber finds that the Defence submission is groundless, because it amounts to nothing else but an uncalled-for repetition of the absolute unsupported suggestion that the Trial Chamber may be biased against the Serbs.” *See also Brđjanin*, (Trial Chamber), September 1, 2004, paras. 44-45 (argument that events need to be viewed from an historical and cultural perspective).

For the holding that the Tribunal possesses “inherent jurisdiction” to address contempt by counsel, see *Prosecutor v. Tadić*, Case No. IT-94-1 (Appeals Chamber), January 31, 2000, paras. 13, 14, 26. *See, e.g., Tadić*, (Appeals Chamber), January 31, 2000, paras. 134, 160, 166, 167, 174 (contempt was imposed for putting forward a case known to be false in material respects and manipulating witnesses).

viii) the right to self-representation

(1) there is a presumption of the right to self-representation

Milosevic, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, para. 11: “Both the Trial Chamber and the Prosecutor recognize that defendants have a presumptive right to represent themselves before the Tribunal. It is not hard to see why. Article 21 of the ICTY Statute, which tracks Article 14 of the International Convention

on Civil and Political Rights, recognizes that a defendant is entitled to a basic set of ‘minimum guarantees, in full equality,’ including the right ‘to defend himself in person or through legal assistance of his own choosing.’ This is a straightforward proposition: given the text’s binary opposition between representation ‘through legal assistance’ and representation ‘in person,’ the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation. Nor should this right be taken lightly. The drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants’ right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves. In the words of the United States Supreme Court in *Faretta v. California*, which was recognized by the Trial Chamber as the classic statement of the right to self-representation, an ‘unwanted counsel “represents” the defendant only through a tenuous and unacceptable legal fiction,’ such that ‘counsel [becomes] not an assistant, but a master.’ Defendants before this Tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber’s judgment that they would be better off if represented by counsel.”

(2) the right to self-representation is a qualified and not an absolute right

Milosevic, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, para. 12: “While this right to self-representation is indisputable, jurisdictions around the world recognize that it is not categorically inviolable. . . . And while this Appellate Chamber has not previously passed on the question, existing precedent from contemporary war crimes tribunals is unanimous in concluding that the right to self-representation ‘is a qualified and not an absolute right.’”

(3) the right may be curtailed where defendant’s self-representation is substantially and persistently obstructing the proper and expeditious conduct of the trial

Milosevic, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, para. 13: “It must further be decided whether the right may be curtailed on the grounds that a defendant’s self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. The Appeals Chamber believes that, under the appropriate circumstances, the Trial Chamber may restrict the right on those grounds. It is particularly instructive in this regard to consider the parallel statutory right of an accused before the Tribunal ‘to be tried in his [own] presence’ – a right that is found in the very same clause of the ICTY Statute as the right to self-representation. Notwithstanding the express enunciation of this right in the Statute, Rule 80(B) of the

Rules of Procedure and Evidence allows a Trial Chamber to ‘order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct.’ If a defendant’s right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently.” (emphasis in original) See also *Milosevic*, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, para. 14.

(4) Trial Chamber did not abuse its discretion in assigning counsel (*Milosevic* case)

Milosevic, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, para. 15: “As to the preliminary issue of the bare decision to assign counsel, the Appeals Chamber cannot conclude – although the question is close – that the Trial Chamber abused its discretion in doing so. Milosevic’s representation of himself required the Trial Chamber to adjourn the proceedings repeatedly throughout the presentation of the Prosecution’s case, and delayed the start of the Defense case by nearly three months. The doctors who examined Milosevic in July [2004] each concluded that, given his condition at the time, Milosevic was not fit to continue defending himself. And it was within the Trial Chamber’s discretion to conclude that any concerns about Assigned Counsel’s ability to represent Milosevic properly (whether because of Milosevic’s refusal to cooperate or because of witnesses’ refusal to testify) were speculative at that time. There was a legitimate basis, in other words, for the Trial Chamber’s conclusion that the trial ‘might last for an unreasonably long time, or worse yet, might not be concluded’ if Milosevic were allowed to continue representing himself. Given that finding, it was within the Trial Chamber’s discretion to assign counsel to Milosevic notwithstanding his opposition.”

(5) restrictions on the right to represent oneself must be limited to the minimum extent necessary

Milosevic, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, paras. 16-17, 19: “These sharp restrictions [imposed by the Trial Chamber, limiting Milosevic’s ability to participate and leaving it to the discretion of the Trial Chamber], unfortunately, were grounded on a fundamental error of law: the Trial Chamber failed to recognize that any restrictions on Milosevic’s right to represent himself must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial. When reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any

restriction of a fundamental right must be in service of ‘a sufficiently important objective,’ and must ‘impair the right . . . no more than is necessary to accomplish the objective.’ Similarly, while the International Covenant on Civil and Political Rights allows some restriction of certain civil rights where ‘necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others,’ the United Nations Human Rights Committee has observed that any such restrictions ‘must conform to the principle of proportionality; . . . they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.’ And the ICTY itself has been guided by a ‘general principle of proportionality’ in assessing defendants’ suitability for provisional release, noting that a restriction on the fundamental right to liberty is acceptable only when it is ‘(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target.’”

Upon remand, the “Trial Chamber should craft a working regime that minimizes the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice. At a minimum, this regime must be rooted in the default presumption that, when he is physically capable of doing so, Milosevic will take the lead in presenting his case” “[T]he Trial Chamber [should] steer a careful course between allowing Milosevic to exercise his fundamental right of self-representation and safeguarding the Tribunal’s basic interest in a reasonably expeditious resolution of the cases before it.”

For discussion of the standard for appellate chamber review of the decision to impose counsel, see *Milosevic*, (Appeals Chamber), November 1, 2004, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, paras. 9-10.

ix) the right to be informed promptly and in detail of the nature and cause of the charge (indictment practice)

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 27: “In accordance with Article 21(4)(a) of the Statute, an accused has the right ‘to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.’” See also *Blaskić*, (Appeals Chamber), July 29, 2004, para. 208 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 139: “The Appeals Chamber points out that the Prosecution’s obligation to draw up a sufficiently precise indictment must be interpreted in the light of the provisions of Articles 21(2), 21(4)(a) and 21(4)(b) of the Statute, which state that, in the determination of charges against him, the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature and cause of the charge against him and to have adequate time and facilities for the preparation of his defence.” See also *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 130 (similar).

For discussion of “the right to be given adequate time and facilities for the preparation of the defense,” see Section (X)(b)(iv), ICTY Digest.

(1) indictment must contain a concise statement of the facts and crime or crimes with which the accused is charged

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 128: “Article 18(4) of the Statute requires that an indictment adheres to the required form, *inter alia* that it contain a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute, wording which is reflected in Rule 47(C) of the Rules.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 208 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 208: “Rule 47(C) of the Rules . . . specifies that an indictment must ‘set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.’” *See also Krnojelac*, (Appeals Chamber), September 17, 2003, para. 129 (similar).

(2) alleged basis of responsibility should be unambiguous in indictment

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 129: “The nature of the alleged responsibility of an accused should be unambiguous in an indictment.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 215 (same).

(3) indictment should state material facts underpinning the charges, but not the evidence

Krvocka et al., (Appeals Chamber), February 28, 2005, paras. 27-28: “It is well established in the case law of the International Tribunal that Articles 18(4) and 21(2), (4)(a), and (4)(b) of the Statute require the Prosecution to plead in the indictment all material facts underpinning the charges in the indictment, but not the evidence by which the material facts are to be proven.” “If the Defence is not properly notified of the material facts of the accused’s alleged criminal activity until the Prosecution files its pre-trial brief or until trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial. Thus, an indictment is defective if it fails to plead required material facts. An indictment which merely lists the charges against the accused without pleading the material facts does not constitute adequate notice because it lacks ‘enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.’”

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 65: “It is well established that an indictment is required to plead the material facts upon which the Prosecution relies, but not the evidence by which those material facts are to be proved.” *See also Kordić and*

Cerkez, (Appeals Chamber), December 17, 2004, para. 142 (similar); *Kapresic*, (Appeals Chamber), October 23, 2001, para. 88 (similar); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 209 (similar); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 131 (similar).

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 130: “The Appeals Chamber has recently considered the law applicable to the form of the indictment, where it held that:

Articles 18(4) and 21(4) of the Statute and Rule 47(C) of the Rules accord the accused an entitlement that translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in an indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery.”

See, e.g., Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 128: “The Trial Chamber . . . held *inter alia* in an ‘Oral Ruling on the fairness of hearing Witness AT’ that the rights of the accused under Article 21(4) of the Statute to be informed promptly of the nature and cause of the charge against him relate to the charge, and not to matters of evidence.”

(a) application—Prosecution not required to prove non-material fact

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 175, 177: “[Kvočka] argues that since the Indictment named him commander or deputy commander of the camp, the Prosecution had to prove beyond a reasonable doubt that he held such a position. Instead the Trial Chamber found that Kvočka held a *de facto* position of authority and influence in the Omarska police station after Meakic was appointed commander of the station. Kvočka submits that he was not charged with having such a position in the Indictment.” “The Appeals Chamber notes that Kvočka was charged in the Indictment with liability under Article 7(1) of the Statute for the crimes committed in the Omarska camp. Kvočka’s formal position in the police hierarchy as commander or deputy commander is immaterial to his responsibility pursuant to Article 7(1): a person does not need to hold a formal position in a hierarchy to incur liability under Article 7(1). The allegation that Kvočka was commander or deputy commander of the camp was not a material fact in relation to his liability under Article 7(1), so that his argument that a

material fact in the Indictment had not been proved is without merit. It was for the same reason unnecessary for the Prosecution to plead the fact that Kvočka held a *de facto* position of authority and influence in the camp. The Appeals Chamber further recalls the finding of the *Kunarac* Appeal Judgement that minor discrepancies between the facts in the Trial Judgement and those in the Indictment do not imply that the events charged in the Indictment did not occur.”

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 621, 622: “The Appeals Chamber notes that Prcac was charged in the Indictment with superior responsibility under Article 7(3) of the Statute on the basis of his position as deputy commander of the Omarska camp, and was not charged as an administrative aide. However, on the basis of the evidence at trial, the Trial Chamber only found Prcac to be an administrative aide to the commander of the camp.” “[T]he Appeals Chamber considers that the title of administrative aide used by the Trial Chamber to describe him is not material to the finding that he was a co-perpetrator in a joint criminal enterprise. The Trial Chamber did not consider the fact of being an administrative aide to be indicative of criminal responsibility. The title itself was given only to sum up his duties, which were different from those of the other guards or their superiors. The Trial Chamber correctly assigned responsibility on the basis of Prcac’s actual duties rather than on the basis of a mere descriptive label.”

See, e.g., *Kordić and Čerkez*, (Appeals Chamber), December 17, 2004, paras. 134-136, for the holding that the indictment was not invalidly pled where later discovered evidence was not contained in the indictment, because “there is no requirement that the evidence to be used by the Prosecution in support of the alleged facts need be included in the Indictment.”

(4) must plead with sufficient particularity the material aspects of the Prosecution case

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 31: “An indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 220: “Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect. The Appeals Chamber in *Kupreskić* examined a situation in which the necessary information to ground the alleged responsibility of an accused was not yet in the Prosecution’s possession and stated that, in such circumstances, “doubt must arise as to whether it is fair to the accused for the trial to proceed.””

(5) whether an indictment is pled with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him

Blaskic, (Appeals Chamber), July 29, 2004, para. 209: “[T]he question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.” See also *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 131 (similar); *Simic, Tadic, and Zarić*, (Trial Chamber), October 17, 2003, para. 109 (similar).

Blaskic, (Appeals Chamber), July 29, 2004, para. 220: “The Appeals Chamber emphasised that the Prosecution is expected to inform the accused of the nature and cause of the case before it goes to trial. It is unacceptable for it to omit the material facts in an indictment with the aim of moulding its case against the accused during the course of the trial depending on how the evidence unfolds. Where the evidence at trial turns out differently than expected, an amendment of the indictment may be required, an adjournment may be granted, or certain evidence may be excluded as being outside the scope of the indictment.”

(6) an insufficiently specific indictment may cause the Appeals Chamber to reverse a conviction

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 142: “[I]f an indictment is insufficiently specific, such a defect ‘may, in certain circumstances cause the Appeals Chamber to reverse a conviction.’” See also *Kupreskic*, (Appeals Chamber), October 23, 2001 para. 114 (same language as quoted).

Blaskic, (Appeals Chamber), July 29, 2004, para. 239: “The Appeals Chamber recognizes, as it did in the *Kupreskic* Appeal Judgement, that in certain circumstances, an indictment which fails to plead with sufficient detail an essential aspect of the Prosecution case, may result in the reversal of a conviction.”

For discussion of how a defective indictment may be “cured” through later submissions, etc., see “may only convict for crimes charged in the indictment unless vagueness or ambiguity cured,” Section (X)(b)(ix)(1-4), ICTY Digest.

(a) application—parts of convictions reversed where not pled in the indictment

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 1027-1028: “The Appeals Chamber notes that the Trial Chamber’s findings in relation to Cerkez’s responsibility under Article 7(3) of the Statute for Counts 29, 30, 31, 33 and 35 were

based on acts which were not charged in the Indictment. The Trial Chamber found Cerkez guilty in relation to Vitez, Stari Vitez and Veceriska, but the Indictment does not charge Cerkez with responsibility under Article 7(3) of the Statute for Stari Vitez and Donja Veceriska in relation to these counts. Furthermore, at the Status Conference on 6 May 2004, the Prosecution stated that it does not dispute that the Trial Chamber made no factual findings related to the involvement of forces under Cerkez's responsibility in Stari Vitez and Veceriska /Donja Veceriska."

"The Appeals Chamber further considers in relation to Kordic that the Trial Chamber made findings that in Novi Travnik, Bosnian Muslims were detained in Stojkovići camp from 18-30 June 1993 and that after the attack on Kresivo men were put in a hangar and the women and children in the elementary school and were there from July to September 1993. However, the Appeals Chamber notes that Kordic was not charged with crimes in these places and the Appeals Chamber therefore has to ignore these findings as they cannot serve as a basis for a conviction."

(7) distinction between material facts and evidence

Blaskić, (Appeals Chamber), July 29, 2004, para. 210: "There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery."

(a) whether or not a fact is considered material depends on the nature of the Prosecution's case

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 28: "Whether or not a fact is considered material depends on the nature of the Prosecution's case." *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 142 (similar).

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 434: "The Appeals Chamber recalls its finding in the *Kupreskić et al.* Appeal Judgement:

The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. . . ."

See also Blaskić, (Appeals Chamber), July 29, 2004, para. 210 (quoting same); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 132 (similar); *Kupreskić*, (Appeals Chamber), October 23, 2001, para. 89 (source of quoted language).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 109: "In accordance with this jurisprudence, Trial Chambers have held that

[a]ll legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment. The materiality of other facts (facts not directly going to legal prerequisites), which also have to be

pleaded in the Indictment, cannot be determined in the abstract. [. . .] Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication. This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of a pre-requisite.”

(b) in determining whether fact is material, should insure finding does not prejudice the accused

Krnjelac, (Appeals Chamber), September 17, 2003, para. 133: “[I]n the *Rutaganda* case, the ICTR Appeals Chamber considered that before a Chamber holds that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, it should generally ensure that such a finding is not prejudicial to the accused. The ICTR Appeals Chamber stated that an example of such prejudice would be vagueness capable of misleading the accused as to the nature of the criminal conduct with which he is charged. Depending on the particular circumstances of each case, the issue will be to determine whether an accused could reasonably identify the crime and conduct specified in each paragraph of the indictment.”

(8) characterization of the alleged criminal conduct and proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity required

Kivcka et al., (Appeals Chamber), February 28, 2005, para. 28: “The Prosecution’s characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.” *See also Kivcka et al.*, (Appeals Chamber), February 28, 2005, para. 65 (similar).

Blaskic, (Appeals Chamber), July 29, 2004, para. 210: “A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged.” *See also Kivcka et al.*, (Appeals Chamber), February 28, 2005, para. 434 (same as *Blaskic*); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 132 (similar); *Kupreskic*, (Appeals Chamber), October 23, 2001, para. 89 (source of quoted language).

(9) less specificity acceptable where crimes committed on a massive scale

Kivcka et al., (Appeals Chamber), February 28, 2005, para. 434: “The Appeals Chamber recalls its finding in the *Kupreskic et al.* Appeal Judgement:

... Obviously, there may be instances where the sheer scale of the alleged crimes ‘makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.’”

See also Krnjevac, (Appeals Chamber), September 17, 2003, para. 132 (same quoted language); *Kupreskic*, (Appeals Chamber), October 23, 2001, para. 89 (source of quoted language).

Krocka et al., (Appeals Chamber), February 28, 2005, para. 30: “Where the scale of the crimes or the fallibility of witness recollection prevents the Prosecution from providing all the necessary material facts, less information may be acceptable. However, even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured.”

Krocka et al., (Appeals Chamber), February 28, 2005, para. 59: “Following various Defence motions alleging defects in the form of the first Indictment, the Trial Chamber issued the ‘Decision on Defence Preliminary Motions on the Form of the Indictment’ on 12 April 1999. The Trial Chamber noted:

[A]s a general rule, the degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions. The massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes – at any rate, the degree of specificity may not be as high as that called for in domestic jurisdictions.”

Krocka et al., (Appeals Chamber), February 28, 2005, para. 434: “[T]he *Kupreskic* Appeals Chamber referred to the decision of the Trial Chamber in the present case of 12 April 1999:

As to the Defence request for more specific information regarding victims of the crimes alleged, the degree of detail that is required presents a special difficulty, and it is in this area that the contrast between a domestic criminal law system and an international criminal tribunal is most pronounced. There can be little doubt but that the identity of the victim is information that is valuable to the Defence in the preparation of their cases. But the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims. However, if the Prosecution is in a position to do so, it should.

In the view of the Trial Chamber, the scale of the crimes committed, in particular in the Keraterm and Omarska camps [in Prijedor], made it impossible for the Prosecution to

include information about all of the victims. The Prosecution did name a large number of victims, and the Appeals Chamber will also take this into consideration when determining the second aspect mentioned above, namely, whether the exclusion of particular information rendered the trial unfair.”

(10) may plead in the alternative

Krnjelac, (Appeals Chamber), September 17, 2003, para. 115: “The Appeals Chamber notes first of all that it is for the Prosecution to determine the legal theory which it considers most appropriate to demonstrate that the facts it intends to submit to the Trial Chamber for assessment enable the responsibility of the person charged to be established. The Prosecution may, to that end, additionally or alternatively rely on one or more legal theories, on condition that it is done clearly, early enough and, in any event, allowing enough time to enable the accused to know what exactly he is accused of and to enable him to prepare his defence accordingly.”

(11) indictment may contain schedules that form part of the indictment

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 67: “In a recent case, the Appeals Chamber held that ‘an indictment must necessarily, in the absence of a special order, consist of one document,’ that ‘schedules to an indictment form an integral part of the indictment,’ and that they can contain essential material facts omitted from the body of the indictment. In the case under appeal, the Appeals Chamber sees no reason to depart from this approach. The events contained in the Schedules amount to material facts that have to be proven before the accused can be held responsible for the crimes contained in the Indictment. The Trial Chamber in this case correctly reached this conclusion.”

Galić, (Trial Chamber), December 5, 2003, paras. 187-188: “The Appeals Chamber assented to this view, namely that the scheduling of certain incidents was necessary to satisfy the standard of specificity applying to indictments:

an indictment pleaded in the very general terms in the body of this indictment, without at least some of the details given in the two schedules, would not have given adequate notice to Galić of the nature of the case he had to meet. [...] Essential material facts omitted from the body of the indictment are the areas where the sniping and shelling caused injuries to the civilian inhabitants of Sarajevo, the approximate dates upon which the relevant events occurred, and also, in relation to the shelling, the areas from which the shelling originated. The only place where those material facts can be found is in the two schedules.

Thus the Schedules serve a procedural requirement – that of proper notice.”

(12) pleading Article 7(1)

(a) indictment should plead the particular form(s) of participation under Article 7(1)

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 129: “[T]he alleged mode of liability of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 215 (similar).

(b) indictment should not simply quote Article 7(1)

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 29: “If an indictment merely quotes the provisions of Article 7(1) without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 129: “The Appeals Chamber recalls that “[t]he practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 215 (same quoted language); *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 134 (same quoted language); *Aleksoski*, para. 171 (source of quoted language).

Blaskić, (Appeals Chamber), July 29, 2004, para. 226: “The Appellant was charged in the alternative with several forms of participation set out in Article 7(1) of the Statute, so arguably he was on notice that all such forms of participation were alleged before the trier of fact. The Prosecution was not required to choose between different forms of participation under Article 7(1); it was entitled to plead all of them. However, the Second Amended Indictment ‘merely repeats the wording of Articles 7(1) and 7(3) without providing any further details about the acts alleged in respect of the type of responsibility incurred.’ This manner of pleading does not clearly inform the accused of the exact nature and cause of the specific allegations against him. The Prosecution should have pleaded the particular forms of participation under Article 7(1) with respect to each incident under each count.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 138: “With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of

liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the ‘commission’ of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both.”

Compare Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 136: “[T]he Prosecution pleads Article 7(1) in its entirety in the Amended Indictment against the three Accused, and in addition in respect of Count 1 (Persecution), included the criminal responsibility of the Accused as ‘acting in concert together and with other Serb civilian and military officials.’ In the words of the Appeals Chamber, ‘[a]lthough greater specificity in drafting Indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an Indictment if it nevertheless makes clear to the accused “the nature and cause of the charge against him.”’ The Trial Chamber observes that the Accused did not make any complaint prior to trial that they did not know the case they had to meet.”

(c) when the Prosecution intends to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be in the indictment

Kročka et al., (Appeals Chamber), February 28, 2005, paras. 29, 41: “When the Prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution’s case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging.”

“Although the Indictment relies on all modes of individual criminal responsibility found in Article 7(1) of the Statute, the Prosecution has failed to plead the material facts necessary to support each of these modes. For example, despite pleading ordering as a mode of responsibility, the Indictment does not include any material facts which allege that any Accused ordered the commission of any particular crime on any occasion. Thus, the Appeals Chamber finds that in pleading modes of responsibility for which no corresponding material facts are pleaded, the Indictment is vague and is therefore defective.”

(d) more detail required where person alleged to have personally committed the criminal acts in question

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 28: “[I]f the Prosecution alleges that an accused personally committed the criminal acts in question, the indictment should include details which explain this allegation, such as the identity of the victim, the time and place of the events, and the means by which the offence was committed.” See also *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 434 (similar); *Krnjelać*, (Appeals Chamber), September 17, 2003, para. 132 (same as para. 434 *Kvočka*); *Kupreskić*, (Appeals Chamber), October 23, 2001, para. 89 (source of language quoted in *Kvočka* para. 434 and *Krnjelać*).

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 65: “As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.’ In the present case, the Trial Chamber was correct to direct the Prosecution to provide in the Indictment, to the extent possible, information about the identity of the victims, the perpetrators and the manner in which the crimes were committed. An indictment pleaded in very general terms would not have given adequate notice to the accused of the nature of the case they had to meet. The Schedules completed the Indictment by giving further information which was sufficiently specific to give notice to the accused of the nature of the case they had to meet.”

Blaskić, (Appeals Chamber), July 29, 2004, paras. 210-213: “The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution. The precise details to be pleaded as material facts are the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible.”

“A distinction has been drawn in the International Tribunal’s jurisprudence between the level of specificity required when pleading: (i) individual responsibility under Article 7(1) in a case where it is not alleged that the accused personally carried out the acts underlying the crimes charged; (ii) individual responsibility under Article 7(1) in a case where it *is* alleged that the accused personally carried out the acts in question; and (iii) superior responsibility under Article 7(3).”

“Depending on the circumstances of a case based on individual criminal responsibility under Article 7(1) of the Statute, the Prosecution may be required to ‘indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged,’ in other words, to indicate the particular form of

participation. This may be required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused, and to enable the accused to effectively and efficiently prepare his defence. The material facts to be pleaded in an indictment may vary depending on the particular form of participation under Article 7(1).”

“When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed ‘with the greatest precision.’ However, where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the ‘particular acts’ or ‘the particular course of conduct’ on the part of the accused which forms the basis for the charges in question.” (emphasis in original)

(e) to allege an accused participated in certain crimes without identifying specific acts committed by the accused does not meet the requirement of a concise statement of facts

Kivcka et al., (Appeals Chamber), February 28, 2005, para. 60: “The Trial Chamber went on to find that ‘it is reasonable to require the Prosecution, depending on the particular circumstances of each case, to provide more specific information, if available, as to the place, the time, the identity of the victims and the means by which the crime was perpetrated.’ The Prosecution was therefore directed, ‘if it is in a position to do so,’ to identify the names of the victims of the crimes alleged, the method of commission of the crime or the manner in which it was committed, and to provide information that would allow for the identification of the other participants in the crimes alleged against the Accused. The Trial Chamber also noted: ‘Merely to allege, as is done throughout the Amended Indictment, that the accused participated in certain crimes without identifying the specific acts alleged to have been committed by the accused does not meet the requirement of a “concise statement of facts.”’ The Trial Chamber therefore directed the Prosecution to provide more information as to the specific acts of the accused that would establish their criminal responsibility under Article 7(1) and 7(3) of the Statute.” See also *Kivcka et al.*, (Appeals Chamber), February 28, 2005, para. 61: “Pursuant to the above-mentioned decision dated 12 April 1999, the Prosecution submitted on 31 May 1999 a second Amended Indictment together with four confidential annexes (“Schedules”).”

(f) pleading joint criminal enterprise

Kivcka et al., (Appeals Chamber), February 28, 2005, para. 42: “The Appeals Chamber . . . considers that the Indictment is defective because it fails to make any specific mention of joint criminal enterprise, although the Prosecution’s case relied on this mode of responsibility. As explained above, joint criminal enterprise responsibility must be specifically pleaded. Although joint criminal enterprise is a means of ‘committing,’ it is

insufficient for an indictment to merely make broad reference to Article 7(1) of the Statute. Such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility. Moreover, in the Indictment the Prosecution has failed to plead the category of joint criminal enterprise or the material facts of the joint criminal enterprise, such as the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise." *See also Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 28 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 138, 144: "The Appeals Chamber . . . considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment – for instance in a pre-trial brief – the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial." "[I]n view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good grounds for refusing, in all fairness, to consider an extended form of liability with respect to Krnjelac."

Krnjelac, (Appeals Chamber), September 17, 2003, paras. 116-117: "The Appeals Chamber holds that using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of common purpose. That principle applies irrespective of the category of joint enterprise alleged. The principal perpetrators of the crimes constituting the common purpose (civilian and military authorities and/or guards and soldiers present at KP Dom [prison complex]) or constituting a foreseeable consequence of it should also be identified as precisely as possible."

"In other words, the accused must know whether the system he is charged with having contributed to involves all the acts being prosecuted or only some of them. In the latter case, the Prosecution must specify the basis on which it considers that the responsibility of the accused may be incurred for acts not included in the common purpose of the participants in the system (physical commission, participation in another joint criminal enterprise whose principal offenders and common purpose must be identified). It would contravene the rights of the defence if the Trial Chamber, seized of a valid shifting indictment where the Prosecution has not stated the theory or theories it considered most likely to establish the accused's responsibility within accepted time-limits, chose a theory not expressly pleaded by the Prosecution."

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, paras. 145-146: "In the case of a joint criminal enterprise, the following elements need to be pleaded: the nature or essence of the joint criminal enterprise; the period over which the enterprise is said to

have existed; the identity of those engaged in the enterprise, at least by reference to a group; and the nature of the participation of the accused in the enterprise. In *Brdanin*, the Trial Chamber held that the relevant state of mind of the accused may be pleaded, either by pleading the evidentiary facts from which the state of mind is to be inferred from, or by pleading the relevant state of mind itself as the material fact.”

“Trial Chambers of the Tribunal have held that, although not explicitly pleaded in the Indictment, certain forms of joint criminal enterprise may be applied. Following the *Kupreskic* jurisprudence, the Trial Chamber in *Krnjelac* held that even where a particular crime is not specifically pleaded in the Indictment as part of a joint criminal enterprise, a case based upon the accused’s participation in a *basic* joint criminal enterprise to commit that crime may still be considered by the Trial Chamber if it is one of the crimes charged in the Indictment and such a case is included within the Prosecution’s Pre-Trial Brief. Trial Chambers have refused to rely on an *extended* form of joint criminal enterprise in the absence of an amendment to the Indictment expressly pleading it.” (emphasis in original)

For discussion of how a defective indictment may be “cured” through later submissions, etc., see “may only convict for crimes charged in the indictment unless vagueness or ambiguity cured,” Section (X)(b)(ix)(12)(h), ICTY Digest.

(i) application—pleading joint criminal enterprise

See, e.g., Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 149 (“acting in concert together” suffices to plead joint criminal enterprise/ common purpose doctrine).

See, e.g., Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 155 (only permitted to include “basic form” of joint criminal enterprise, not “extended form” where type of joint criminal enterprise not pled).

See, e.g., Krnjelac, (Appeals Chamber), September 17, 2003, paras. 118-120 (discussing how the joint criminal enterprise should have been pled in that case).

(13) pleading Article 7(3)

Blaskic, (Appeals Chamber), July 29, 2004, paras. 216, 218, 219: “In relation to an allegation of superior responsibility, the accused needs to know not only what is alleged to have been his own conduct giving rise to his responsibility as a superior, but also what is alleged to have been the conduct of those persons for which he is alleged to be responsible, subject to the Prosecution’s ability to provide those particulars.”

“In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in a case where superior criminal responsibility pursuant to Article 7(3) of the Statute is alleged, the material facts which must be pleaded in the indictment are:

- (a) (i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible;
- (b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue; and
- (c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.”

“With respect to the *mens rea*, there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded. Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication. This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the legal prerequisite.”

(a) application—pleading Article 7(3)

Blaskic, (Appeals Chamber), July 29, 2004, paras. 227-229: The Appeals Chamber held that the “Second Amended Indictment failed to plead the material facts with sufficient particularity” where it “clearly identifies . . . the command position occupied by the Appellant,” but did “not set out the individuals and units subordinated to him, or the material facts regarding the acts committed and the individuals who committed them. Moreover, the mere reproduction in the Second Amended Indictment of the text of Article 7(3) in each count or group of counts, without any further details, gives rise to ambiguity as to the exact nature and cause of the Prosecution’s allegations against the Appellant.”

**(14) may only convict for crimes charged in the indictment unless
vagueness or ambiguity cured**

**(a) may be cured by timely, clear and consistent information
from the Prosecution**

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 33: “In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused has nevertheless been accorded a fair trial. In some instances, where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness, a conviction may be entered. Where the failure to give sufficient notice of the legal and factual reasons for the charges against him has violated the right to a fair trial, no conviction may result.”

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 34: “When challenges to an indictment are raised on appeal, the indictment can no longer be amended and so the Appeals Chamber must determine whether the error of trying the accused on a defective indictment ‘invalidat[ed] the decision.’ In making this determination, the Appeals Chamber does not exclude the possibility that, in some instances, the prejudicial effect of a defective indictment can be ‘remedied’ if the Prosecution has provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her, which compensates for the failure of the indictment to give proper notice of the charges.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 142: “[T]he Appeals Chamber in *Kupreskic et al.* left open the possibility of a defective indictment being cured ‘if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.’”

Blaskic, (Appeals Chamber), July 29, 2004, paras. 237-238: “The Appeals Chamber notes that it has stated in the *Kupreskic* Appeal Judgement that:

[t]he Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.”

“The Appeals Chamber is not persuaded by the argument that prejudice should be presumed [from a defective indictment]. . . .” *See also Kupreskic*, (Appeals Chamber), October 23, 2001 para. 114 (source of quoted language).

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 110: “In the words of the Appeals Chamber, ‘generally, an Indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. [...] The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective Indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.’ Moreover, the jurisprudence emphasises that the Prosecution is expected to know its case, and inform the accused of the nature and cause of that case, before it goes to trial.

It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.”

Simić, Tadić, and Zarić, (Trial Chamber), October 17, 2003, para. 112: “In cases where an Indictment provides insufficient details as to the essential elements of the Prosecution case, the jurisprudence of the Tribunal accepts that a defendant may not be prejudiced where the defence is put on reasonable notice of the Prosecution case before trial, i.e. in the Prosecution Pre-Trial Brief, or at the latest, in the Prosecution opening statement.”

(b) issue of notice—whether pleading defect impaired the accused’s ability to prepare his defense/ whether trial was rendered unfair

Kročka et al., (Appeals Chamber), February 28, 2005, para. 35: “When an accused raises the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to demonstrate that the accused’s ability to prepare a defence was not materially impaired. When an appellant raises a defect in the indictment for the first time on appeal, then the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 142-143: “Where alleged material facts are shown to have been omitted from an indictment, the issue to be determined is whether the accused was in a reasonable position to identify the charges against him, and conduct specified in each paragraph, notwithstanding this omission.” “Whether the Prosecution has cured a defect in the Indictment and whether there remains any prejudice to the accused are both questions aimed at assessing, whether the trial was ‘rendered unfair.’”

Blaskić, (Appeals Chamber), July 29, 2004, para. 221: “If a trial verdict is found to have relied upon material facts not pleaded in an indictment, it is still necessary to consider whether the trial was thereby rendered unfair. If the trial was rendered unfair, then an appropriate remedy must be found.”

Simic, Tadic, and Zarić, (Trial Chamber), October 17, 2003, para. 146: “There is no injustice to the accused if he is given an adequate opportunity to prepare an effective defence. The Appeals Chamber in *Kupreskic* further held that a fundamental defect in an Indictment could be considered harmless only if it could be demonstrated that the defendant’s ability to prepare his defence was not materially impaired. The Appeals Chamber held that a Pre-Trial Brief may go towards curing a defective Indictment.”

(c) application—“curing the indictment”

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 43-54: “The Appeals Chamber notes . . . [as to the fact that joint criminal enterprise was not pled in the indictment] that a careful review of the trial record reveals that the Prosecution gave timely, clear, and consistent information to the Appellants, which detailed the factual basis of the charges against them and thereby compensated for the Indictment’s failure to give proper notice of the Prosecution’s intent to rely on joint criminal enterprise responsibility.”

“The Appeals Chamber . . . notes that the Prosecution’s Pre-Trial Brief of 9 April 1999 reproduces Article 7(1) of the Statute and mentions the common purpose doctrine in broad terms but does not specify that the Prosecution intends to rely on this mode of responsibility.” “In the Prosecution’s Submission of Updated Version of Pre-Trial Brief, filed 14 February 2000, the Prosecution addresses common purpose responsibility in some detail.” “The Appeals Chamber further considers that the Prosecution’s concentration on joint criminal enterprise is emphasized again in the opening statement of 28 February 2000.” “When the hearing reopened, on 2 May 2000, the Prosecution made a further opening statement addressing Prcać’s participation in a joint criminal enterprise with the other co-accused.” “On 13 October 2000, during the Prosecution’s case, the Trial Chamber ruled on the Prosecution’s request to file an amended indictment. During the oral argument on this issue, Prosecution counsel reiterated its focus on joint criminal enterprise”

“The Appeals Chamber finds that the Prosecution gave clear and consistent notice, starting before the commencement of the trial and continuing throughout the Prosecution’s case, that it intended to rely on joint criminal enterprise. If any of the Appellants was surprised by Prosecution or Trial Chamber references to joint criminal enterprise responsibility, none of the Appellants brought a timely objection to the attention of the Trial Chamber.”

“The issue of adequacy of notice of joint criminal enterprise was raised in Kvočka’s final trial brief and in Prcać’s closing argument and was considered by the Trial Chamber in the Judgement. The Trial Chamber emphasized ‘that the charges in the Amended Indictment that the accused “instigated, committed or otherwise aided and abetted” crimes may include responsibility for participating in a joint criminal enterprise designed to accomplish such crimes.’ The Trial Chamber held that it was ‘within its discretion to characterize the form of participation of the accused, if any, according to the theory of responsibility it deems most appropriate, within the limits of the Amended

Indictment and insofar as the evidence permits.” “The Appellants’ trial submissions further demonstrate that they were on notice of the Prosecution’s reliance on joint criminal enterprise during the trial proceedings.” “The Appellants’ understanding of the nature of the Prosecution’s case can also be observed in their final trial briefs and closing arguments in which they advance legal and factual arguments relating to joint criminal enterprise.”

“Upon careful review of the trial record, the Appeals Chamber finds that the Prosecution gave timely, clear and consistent information to the Appellants, which detailed the factual basis of the charges against them and compensated for the Indictment’s failure to give proper notice of the Prosecution’s intent to rely on joint criminal enterprise responsibility. This ground of appeal is therefore dismissed.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 137, 139, 140: “[T]he Appeals Chamber notes that, contrary to the arguments of the Prosecution, the Indictment does not explicitly plead the existence of a ‘joint criminal enterprise’ . . .”

“The Appeals Chamber considers that, as to the means by which the Prosecution envisaged the participation of Kordic in the commission of the crimes, the Indictment is too generally formulated. The issue is therefore whether the ambiguity resulting from unspecific allegations as to Kordic’s liability was clarified by the Prosecution in its post-Indictment communications, and, if so, whether this gave Kordic sufficient and timely notice about it.”

“The Appeals Chamber notes that the Indictment is supplemented by the Prosecution’s Pre-trial Brief as to the form of responsibility envisaged, and it expressly alleges that Kordic’s liability arises from his intentional participation in a common plan or design as a co-perpetrator. The Prosecution’s Pre-trial Brief also describes in detail Kordic’s actions and conduct supporting the allegation that he planned, ordered, and instigated persecutions.” *See also Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 147-148 (lack of pleading material fact that a certain meeting was held on April 15, 1993 was error, but not prejudicial).

Blaskic, (Appeals Chamber), July 29, 2004, paras. 241-242, 245: “In the case at hand, no verdict was delivered at trial on the basis of material facts which were not pleaded in the Indictment. Therefore, a finding that the trial was unfair would be necessarily dependent upon a showing that the Appellant’s ability to prepare his defence was materially impaired by the defects in the Second Amended Indictment.”

“The Appeals Chamber is not persuaded by the Appellant’s arguments that he was prejudiced by the Prosecution’s alleged failure to ‘commit’ to either theory of responsibility during the trial with respect to the crimes charged. It is apparent from the Prosecution’s opening statement that the case against the Appellant relied on both theories of responsibility. . . . [T]he Prosecution was not obliged to ‘commit’ to one theory of responsibility, or choose between different heads of responsibility in the presentation of its case.”

“[T]he Appeals Chamber is not persuaded by the arguments put forward by the Appellant in support of his claim that defects in the Second Amended Indictment hampered his ability to prepare his defence and thus rendered his trial unfair.”

(d) application—defective indictment not cured

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 157, 160, 164: “A careful reading of paragraphs 45 (relating to Kordic) and 51 (relating to Cerkez) of the Indictment shows that expulsion and forcible transfer of Bosnian Muslims is used:

Many Bosnian Muslims were expelled or forcibly transferred from their homes and villages. [...]

This wording is not, however, repeated in the subsequent Counts 21 and 22 (relating to Kordic) or Counts 29 and 30 (relating to Cerkez)” “Based on the wording of the above-mentioned paragraphs of the Indictment, Kordic and Cerkez were not sufficiently informed that they had to – and how they could – defend themselves against possible allegations of forcible transfer and/or expulsion of Bosnian Muslim civilians.” “In applying the standard as set out by the Appeals Chamber in *Kupreskic et al.*, this vagueness of the Indictment does not constitute a ‘minor defect nor a technical imperfection,’ instead, it amounts to a ‘fundamental defect’ that ‘materially impaired’ the ability of the Accused to defend himself against the charges.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 165, 167-172: “An examination of the Prosecution Pre-trial Brief reveals that the information contained therein did not sufficiently inform the Accused of the nature and scope of a charge of forcible transfer and/or expulsion of Bosnian Muslim civilians as an underlying offence of persecutions.” “In this context, the Appeals Chamber recalls its finding in *Kupreskic et al.* that a defective indictment can in some instances be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.”

“The Appeals Chamber finds, however, that the information contained in the Pre-trial Brief does not satisfy this test and that the Prosecution accordingly failed to cure the vagueness of the Indictment in relation to the forcible transfer and /or expulsion of Bosnian Muslim civilians in these locations. Although the Pre-trial Brief mentions more specifically the times and locations of the attacks in Novi Travnik, Busovaca, Ahmici, Zenica, and Stupni Do, the Appeals Chamber is not satisfied that the Prosecution identified the ‘particular acts’ or ‘the particular course of conduct’ with sufficient clarity to cure the vagueness of the Indictment in relation to these locations. The Accused were not put on notice about the nature of the allegations against them with respect to the forcible transfer and/or expulsion of Bosnian Muslim civilians. It does not specify in what way these Bosnian Muslims were allegedly expelled and to what destinations they were allegedly expelled. Furthermore, Annex 3 to the Prosecution Pre-trial Brief, a document linking witnesses to counts and locations, does not provide any further information on the forcible transfer and/or expulsion of Bosnian Muslim

civilians.”

“The Appeals Chamber notes that, in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment. However, an examination of the Prosecution Opening Statement reveals that it did not further clarify the forcible transfer and/or expulsion of Bosnian Muslim civilians. The Prosecution only once referred ‘to the developing pattern of behaviour leading to [...] the expulsion of one community from the territory aspired to by the other.’ This reference was made in relation to an attack which was ‘not the subject of a count in the indictment,’ and no specific information was given on the victims or the places to which they were expelled.” “Finally, the Appeals Chamber notes after reviewing the trial record that the Accused were not put on notice by the Trial Chamber with regard to this issue by way of an instructive, judicial suggestion.”

“For the reasons set out above, the Appeals Chamber finds that the Indictment is defective in relation to the allegations concerning the forcible transfer/removal and/or expulsion of Bosnian Muslim civilians, and that these defects were not been cured in the Prosecution Pre-trial Brief, the Prosecution Opening Statement, or elsewhere.” “The Appeals Chamber therefore finds that the Trial Chamber was not seized of the charge of forcible transfer and/or expulsion in relation to both Kordic and Cerkez. Therefore, the convictions of Kordic and Cerkez could not entail the forcible transfer and/or expulsion of Bosnian Muslim civilians.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 240: “In *Kupreskic*, Zoran and Mirjan Kupreskic were charged generally with crimes occurring in and around a particular village. At trial, the case against them was eventually narrowed to the point where it focused solely on an attack on two houses and the killing of six people, and it was for this attack that they were convicted. The Appeals Chamber described this process as a ‘radical transformation’ of the charges against the accused, which occurred between the issuing of the indictment and the issuing of the judgement. The Appeals Chamber found that the defects in the indictment were only compounded by the ‘extremely general’ nature of the Prosecution’s Pre-trial Brief, and its failure to disclose the statement of the key witness relied on to convict the two accused until only ‘one to one-and-a-half weeks prior to trial and less than a month prior to [the witness’s] testimony in court.’ For all these reasons, the Appeals Chamber found that the ability of the accused to prepare their defence had been ‘seriously infringed’ and the fairness of their trial directly affected by the defective nature of the original indictment.”

(15) motion to amend an indictment before Trial Chamber

Krocka et al., (Appeals Chamber), February 28, 2005, para. 32: “When considering a motion to amend an indictment, the Trial Chamber must consider whether the Prosecution has provided the accused with clear and timely notice of the allegations such that the Defence has had a fair opportunity to conduct investigations and to prepare its response notwithstanding the defective indictment.”

(16) challenges to the form of the indictment not timely after trial

Brđjanin, (Trial Chamber), September 1, 2004, paras. 51, 52: As to challenges regarding the form of the indictment brought after trial, the Trial Chamber held: “[t]he Defence for the Accused was given the opportunity to challenge the form of the indictment during the pre-trial phase of the case, and in fact did so on one occasion.” “It is accordingly not now open to the Defence to allege defects in the form of the Indictment.” “Additionally, even if the Trial Chamber were to entertain the Defence submissions at this late stage, the Trial Chamber is satisfied that the Defence challenges to the form of the Indictment are unjustified.”

c) General considerations regarding the evaluation of evidence

Note: Because this Digest does not include evidentiary practice, but only judgments, this section by no means contains a full compilation of the ICTY law on evidentiary practice.

i) Trial Chamber may admit any relevant evidence with probative value

Halilović, (Trial Chamber), November 16, 2005, para. 14: “Rule 89(C) of the Rules provides that the Trial Chamber ‘may admit any relevant evidence which it deems to have probative value.’” *See also Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 20 (same).

ii) mere admission of evidence has no bearing on its weight

Limaj et al., (Trial Chamber), November 30, 2005, para. 12: “The Chamber has been required to weigh and evaluate the evidence presented by all parties. It would emphasise that the mere admission of evidence in the course of the trial has no bearing on the weight which the Chamber subsequently attaches to it.”

iii) inferences

Krstić, (Appeals Chamber), April 19, 2004, para. 41: “The Appeals Chamber has taken the view that, when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 10: “[I]t has been necessary for the Chamber to draw one or more inferences from facts established by the evidence. Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of

proof requires that an acquittal be entered in respect of that count.” See also *Strugar*, (Trial Chamber), January 31, 2005, para. 5 (similar).

iv) preference for oral testimony

Halilovic, (Trial Chamber), November 16, 2005, para. 15: “As reflected in the Rules, there is a preference for witnesses to give evidence orally.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 21 (same).

v) hearsay evidence

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 281, 282: “In *Aleksovski* the Appeals Chamber found that Trial Chambers have a wide discretion in admitting hearsay evidence. The Appeals Chamber held that establishing the reliability of hearsay evidence is of paramount importance, since hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents.” “Hearsay is defined as ‘the statement of a person made otherwise than in the proceedings in which it is tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says.’”

Halilovic, (Trial Chamber), November 16, 2005, para. 15: “Hearsay evidence is evidence of facts not within the testifying witness’ own knowledge. In evaluating the probative value of hearsay evidence, the Trial Chamber has carefully considered indicia of its reliability and, for this purpose, it has evaluated whether the statement was ‘voluntary, truthful and trustworthy’ and has considered the content of the evidence and the circumstances under which it arose.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 21 (same).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 23: “Evidence of facts outside the testifying witness’ own knowledge constitutes hearsay evidence. Hearsay evidence ‘is not inadmissible *per se*, even when it cannot be examined at its source or when it is not corroborated by direct evidence.’ The Trial Chamber has carefully scrutinised hearsay evidence, taking into account that the source has not been the subject of a solemn declaration and that its reliability may be affected by a potential compounding of errors of perception and memory, before determining whether or not to rely on it.”

vi) expert testimony

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 27: “When assessing the probative value of [an] expert’s oral and written evidence, the Trial Chamber endorses the *Vasijevic* Trial Chamber’s view that the factors to consider are ‘the professional competence of the expert, the methodologies used by the expert and the credibility of

the findings made in light of these factors and other evidence accepted by the Trial Chamber.” See also *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 28 (same standard).

vii) circumstantial evidence

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 289: “[T]he *Celebici* [a/k/a *Delalic*] Appeal Judgement . . . held that:

A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him [...] Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.”

See *Delalic et al.*, (Appeals Chamber), February 20, 2001, para. 458 (source of quoted language); *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 27 (quoting same).

Halilovic, (Trial Chamber), November 16, 2005, para. 15: “Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred. In some instances, the Trial Chamber has relied upon circumstantial evidence in order to determine whether or not a certain conclusion could be drawn. The Trial Chamber follows the Appeals Chamber when considering that [s]uch a conclusion must be established beyond reasonable doubt. [...] It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is [as] consistent with the [innocence of an accused as with his or her guilt], he or she must be acquitted.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 21 (same).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 27: “The Trial Chamber notes that in some instances it relied upon circumstantial evidence in order to determine whether or not certain conclusions could be drawn. Circumstantial evidence is admissible where it is in the interests of justice to do so.”

viii) non-live testimony of witnesses

Halilovic, (Trial Chamber), November 16, 2005, para. 16: “Both the Prosecution and Defence made applications under Rule 92 *bis*, which permits parties to tender the evidence of a witness other than through means of *in vivo* testimony. The Trial Chamber permitted the Parties to tender certified written statements or former

testimony of witnesses under Rule 92 *bis* in lieu of live testimony.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 22 (same).

Halilovic, (Trial Chamber), November 16, 2005, para. 19: “Before admitting evidence pursuant to Rule 92 *bis*, the Trial Chamber found that each written statement did not go to the acts and conduct of the Accused, was relevant to the present case, had probative value under Rule 89(C) of the Rules, and was cumulative in nature. The evidence put forward by the witnesses under Rule 92 *bis* was admitted without cross-examination. The Trial Chamber recalls the observation of the Appeals Chamber in the *Galic* case that ‘where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement.’ Such ‘other evidence’ may include other witnesses’ testimony, documentary evidence or video evidence.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 26 (similar).

ix) evaluating *viva voce* testimony of witnesses

Halilovic, (Trial Chamber), November 16, 2005, para. 17: “In evaluating the evidence given *viva voce* the Trial Chamber has given due regard, among other things, to the individual circumstances of the witness, including the witness’ possible involvement in the events and the risk of self-incrimination, his relationship with the Accused and possible contamination between witnesses’ testimonies. The Trial Chamber has considered the internal consistency of each witness’ testimony and other features of their evidence, as well as whether corroborating evidence exists in the Trial record. Recalling that the evidence presented in this case relates to events that occurred twelve years ago, the Trial Chamber endorses the conclusion of the *Krnjelac* Trial Chamber that it did not treat:

minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail. [...] Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution more difficult, the lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.

However, in cases of repeated contradictions within a witness’ testimony, the Trial Chamber has disregarded his or her evidence unless it has been sufficiently corroborated. In light of the factors mentioned above, in particular the risk of self-incrimination and the possible contamination between witnesses’ testimonies, the Trial Chamber is not fully satisfied that the evidence it has heard from certain witnesses was entirely reliable. The Trial Chamber has therefore treated their testimony with caution and has relied on it only if corroborated by other evidence.” See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 23 (similar).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 22: “Many witnesses testified to events that occurred around 10 years prior to their appearance before the Trial Chamber. The Trial Chamber accepts that where a significant period of time has elapsed between the acts charged in the Amended Indictment and the trial, or where the witness is testifying in relation to repetitive, continuous or traumatic events, it is not always reasonable to expect witnesses to recall with precision the details, such as exact date or time, and/or sequence of the events to which they testify. The Trial Chamber has taken these factors into account when assessing the credibility of witnesses, and finds that the lack of precision does not necessarily discredit their evidence, provided that the discrepancies relate to matters peripheral to the charges in the Amended Indictment.”

(1) evaluating testimony of former defendant who entered plea

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 24: “The Trial Chamber has heard the testimony of former co-accused, Momir Nikolic and Dragan Obrenovic, who appeared as witnesses for the Prosecution after having been convicted by the Trial Chamber, following them pleading guilty. As is the case for all witnesses, the Trial Chamber has assessed their evidence in light of the circumstances under which they gave their testimony and in particular, that they testified pursuant to a plea agreement; that they took the solemn declaration to speak the truth; that the charges dropped against them were dropped without prejudice; and that they had not yet been sentenced at the time of their testimony. Their testimony has been evaluated against the complete trial record.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 21: “Stevan Todorovic was initially a co-Accused in this case, until he pleaded guilty and became a witness for the Prosecution. The Trial Chamber acknowledges the problems that may be associated with his testimony – noting in particular the incentive for him to testify in a manner favourable to the Prosecution case and the hostile relations between him and his former co-Accused – but it does not consider his testimony inherently unreliable. When assessing the probative value and reliability of Stevan Todorovic’s evidence, the Trial Chamber viewed in his favour the fact that he was sentenced prior to giving his oral testimony. The Trial Chamber has also treated the testimony of the remaining co-Accused with caution and subjected it, as all other evidence, ‘to the tests of relevance, probative value and reliability’ according to Rule 89.”

(2) inconsistencies between witness testimony and prior statement

Limaj et al., (Trial Chamber), November 30, 2005, para. 12: “The Chamber . . . observes that the seven years that have passed since the events in the Indictment have, in all likelihood, affected the accuracy and reliability of the memories of witnesses,

understandably so. There were times, however, where the oral evidence of a witness differed from the account he gave in a prior statement. It has been recognised that ‘it lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court.’ Nevertheless, these matters called for careful scrutiny when determining the weight to be given to any such evidence.” *See also Limaj et al.*, (Trial Chamber), November 30, 2005, para. 543 (similar).

Limaj et al., (Trial Chamber), November 30, 2005, para. 13: “In the present case, a number of former KLA [Kosovo Liberation Army] members were subpoenaed to testify before the Chamber as Prosecution witnesses. In the course of the evidence of some of these witnesses, it became apparent that their oral evidence was, on certain points, materially different from a prior statement of the witness. Some of these differences were explained by the witnesses during their evidence. Some suggested the differences were due to the method of questioning when the prior statement was made, in particular, in several instances suggesting a lack of specificity as to the time period being referred to in a particular question. The Chamber was able to accept this possibility in some, but not all, cases. Other differences, however, remain unaccounted for. At times, it became apparent to the Chamber, in particular taking into account the demeanour of the witness and the explanation offered for the differences, that the oral evidence of some of these witnesses was deliberately contrived to render it much less favourable to the Prosecution than the prior statement. . . . These are matters which the Chamber has taken into consideration in assessing the personal credibility of particular witnesses in this case, an assessment which in many cases has been most material to the Chamber’s acceptance or rejection of the evidence of a witness, whether in whole or in part.”

Strugar, (Trial Chamber), January 31, 2005, para. 8: “The Chamber . . . notes that there were times in the course of the trial where the oral evidence of a witness was not identical to the account given in a prior statement. While this called for scrutiny of the credibility of the witness, the Chamber also accepts what has been expressed by other Trial Chambers that ‘it lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court.’ A witness may also forget some matter or become confused.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 24: “In cases where witnesses had given statements prior to their oral testimony in court, the Trial Chamber has considered to what extent such evidence was consistent. The Trial Chamber is of the view that any oral testimony will not necessarily be exactly parallel to that given in earlier statements; in some instances the prior statements had been made several years before the trial, or questions posed may have been put differently and additional details remembered. In this context, the Trial Chamber has not treated minor inconsistencies or irrelevant discrepancies as discrediting such evidence, provided that the witness has

testified to the essence of the incident charged in sufficient detail. The same principle has been applied with respect to discrepancies between the testimonies of different witnesses. Where there are inconsistencies between out of court evidence and trial testimony, the Trial Chamber duly considered the weight to be given to the prior statement.”

(3) evaluating the testimony of “victim witnesses”

Limaj et al., (Trial Chamber), November 30, 2005, para. 15: “The Chamber has . . . heard the evidence of a number of witnesses who may be characterised as ‘victim witnesses.’ The events as to which they testified in court were extremely traumatic events, involving at times matters of life or death. In evaluating the evidence given by these witnesses, the Chamber has taken into consideration that any observation they made at the time may have been affected by stress and fear; this has called for particular scrutiny on the part of the Chamber. The Chamber has also been conscious that many victim-witnesses with Albanian roots had family links in varying degrees to each other or were from villages located near to the village of another witness or witnesses. The cultural factors of loyalty and honour . . . may also have affected their evidence as to the events, and the Chamber has, therefore, sought to take account of this. Further, witnesses might well have, and in some cases, testified as to having discussed the events with one another in the course of the years that have passed since the relevant events. The Chamber further observed that a significant number of witnesses requested protective measures at trial, and expressed concerns for their lives and those of their family. This context of fear, in particular with respect to witnesses still living in Kosovo, was very perceptible throughout the trial. The Chamber heard evidence about witnesses requesting to be interviewed by investigators at night to avoid the fact of an interview becoming known, or in a third language rather than through Albanian interpreters, as they feared they would be compromised. It is also the case that a number of victims who came to testify only did so in response to a subpoena issued by the Chamber. The Chamber has sought, *inter alia*, to give due consideration to these matters as it has undertaken the very difficult task, in this case, of evaluating the evidence.”

x) testimony of a single witness on a material fact does not require corroboration, but does require cautious scrutiny

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 274: “The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence. In *Kupreskic et al.*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation. A Trial Chamber may thus convict an accused on the basis of a single witness, although such

evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 21: “In some cases only one witness has given evidence on a fact material to this case. Of course, the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. Nevertheless, it has been the approach of the Chamber that any such evidence required particularly cautious scrutiny before the Chamber placed reliance upon it.” *See also Strugar*, (Trial Chamber), January 31, 2005, para. 9 (similar).

Halilovic, (Trial Chamber), November 16, 2005, para. 18: “In some instances, only one witness has given evidence of an incident for which the Accused has been charged. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. In such a situation, the Trial Chamber has carefully examined the evidence of the witness before making a finding of guilt against the Accused.” *See also Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 25 (similar).

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 25: “In some instances, the evidence of only one witness was available in relation to certain material facts. Although in some circumstances the evidence of a single witness may not be sufficient for the Trial Chamber to make a determination, a single witness’ testimony may gain strength from corroborating evidence, and the Appeals Chamber has held that the ‘converse also holds true.’ However, the established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. Therefore, where the Trial Chamber has relied upon the evidence of a single witness, it has carefully scrutinised that evidence before making a finding on the basis of it.”

Stakic, (Trial Chamber), July 31, 2003, para. 15: “If it is not corroborated by other evidence, the testimony of a single witness must be treated with great caution. Apart from the fact that much time has passed since 1992, the Trial Chamber is aware of the limited value of witness testimony in general. Special caution is warranted in cases like this one which have both a highly political, ethnic and religious element and a complex historical background. The Judges are convinced that for the most part, most witnesses sought to tell the Chamber what they believed to be the truth. However, the personal involvement in tragedies like the one in the former Yugoslavia often consciously or unconsciously shapes a testimony.”

xi) agreed facts and documentary evidence from another case

Halilović, (Trial Chamber), November 16, 2005, para. 20: “The Trial Chamber has evaluated and considered the agreed facts from the *Galić* and the *Martinović and Naletilić* Trial Judgements, as well as the facts concerning the ABiH [Army of the Republic of Bosnia and Herzegovina] military security service. Agreed facts were accepted under Rule 65 *ter* (H) of the Rules, and were subjected, as all other evidence, ‘to the tests of relevance, probative value and reliability,’ according to Rule 89 of the Rules.”

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 28. “The Trial Chamber has evaluated and considered the agreed facts and documentary evidence from the *Krstić* Trial Judgement, which were admitted into evidence in this case on 19 December 2003. The Trial Chamber decided to accept the agreed facts and documents under Rule 65 *ter* (H) of the Rules, and not to take judicial notice of them under Rule 94 (B) of the Rules. Agreed facts and documents were subjected, as all other evidence, ‘to the tests of relevance, probative value and reliability,’ according to Rule 89 of the Rules.”

xii) visual identification evidence

Limaj et al., (Trial Chamber), November 30, 2005, para. 17: “It has become widely accepted in domestic criminal law systems that visual identification evidence is a category of evidence which is particularly liable to error. The jurisprudence in these systems recognises that errors may occur even with the most honest, confident and apparently impressive witnesses. Wrongful convictions based on mistaken eyewitness identifications have been known to result. As a consequence, visual identification evidence is treated with very special care. In this Tribunal, the Appeals Chamber has drawn attention to the need for ‘extreme caution’ in relation to visual identification evidence. In doing so, it highlighted that the evaluation of an individual witness’ evidence, as well as the evidence as a whole, should be conducted with considerations such as those enunciated in *Reg v Turnbull* in mind. The Appeals Chamber has stressed the need to ‘acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations.’ The Appeals Chamber has identified, albeit not exhaustively, a number of factors which may render a decision to rely on identification evidence unsafe: ‘identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant’s physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness’ delayed assertion of memory regarding the defendant coupled with the “clear possibility” from the circumstances that the witness had been influenced by suggestions from others.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 20: “With particular regard to the evidence of the visual identification of each of the Accused by various witnesses, it is to be emphasised that, like all elements of an offence, the identification of each Accused as a perpetrator as alleged must be proved by the Prosecution beyond reasonable doubt. This is to be determined, however, in light of all evidence bearing on the issue of identification, evidence both for and against. In a particular case, this could include, for example, an alibi or whether an identifying witness has a motive which would be furthered by a false identification. Evidence of the visual identification of an Accused by a witness is but one piece of what may be the relevant evidence in a particular case. The ultimate weight to be attached to each relevant piece of evidence, including each visual identification where more than one witness has identified an Accused, is not to be determined in isolation. Even though each visual identification and each other relevant piece of evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, it is the cumulative effect of the evidence, *i.e.* the totality of the evidence bearing on the identification of an Accused, which must be weighed to determine whether the Prosecution has proved beyond reasonable doubt that each Accused is a perpetrator as alleged.”

xiii) in-court identification

Limaj et al., (Trial Chamber), November 30, 2005, para. 18: “Some witnesses have identified one or more of the Accused in the course of their evidence in the courtroom. Leaving aside other circumstances relevant to the reliability of an identification by each of these witnesses, circumstances which are considered later in this decision, the Chamber is very conscious that an identification of an Accused in a courtroom may well have been unduly and unconsciously influenced by the physical placement of the Accused and the other factors which make an Accused a focus of attention in a courtroom.”

Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, para. 26: “The Trial Chamber . . . scrutinized the in-court identification of the Accused by witnesses, noting that evidence on identification is generally viewed with caution, but also acknowledging, given the close knit community from which both the Accused and witnesses come, that identification evidence may carry more weight when considering its reliability where witnesses have prior knowledge of the Accused.”

(1) witness testimony could be relied upon even where failure of in-court identification

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 473: “In the present case, the issue of identification was raised by the Defence at trial and was noted by the Trial Chamber. The Appeals Chamber finds that it was open to a reasonable trier of fact to

rely on Witness T's testimony despite the witness' failure to identify Zigic in the courtroom."

xiv) identifications made using photo spreads

Limaj et al., (Trial Chamber), November 30, 2005, para. 19: "Reservations have . . . been expressed by another Trial Chamber with respect to the weight to be attached to identifications made using photo spreads. . . . A particular concern with a photo spread identification is that the photograph used of the Accused may not be a typical likeness even though it accurately records the features of the Accused as they appeared at one particular moment. To this the Chamber would add, as other relevant factors, the clarity or quality of the photograph of the Accused used in the photo spread, and the limitations inherent in a small two-dimensional photograph by contrast with a three-dimensional view of a live person. It is also a material factor whether the witness was previously familiar with the subject of the identification, *i.e.* whether he is 'recognising' someone previously known or 'identifying' a stranger. While the Chamber has not been prepared to disregard every identification made using a photo spread of one or more of the Accused in the present case, it has endeavoured to analyse all the circumstances as disclosed in the evidence, and potentially affecting such identifications, conscious of their limitations and potential unreliability, and has assessed the reliability of these identifications with considerable care and caution. Among the matters the Chamber regarded as being of particular relevance to this exercise was whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification, whether the identification was made immediately and with confidence, or otherwise, whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media, and whether the procedure in some way may have encouraged the witness to make a positive identification despite some uncertainty, or encouraged the witness to identify an Accused rather than someone else."

xv) intercept-related evidence

Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 30: "During the Prosecution's case, the Jokic Defence questioned the validity and reliability of the intercept evidence. The Trial Chamber has found that the intercept evidence is relevant to the case at hand, as it relates directly in time and in place to the events alleged in the Indictment, and that the evidence has probative value within the meaning of Rule 89(C) of the Rules. The Trial Chamber is convinced that the intercept-related evidence admitted is a reliable source of information. The probative value of this evidence will be considered in light of the trial record as a whole."

xvi) on-site visits

Blagojević and Jokić, (Trial Chamber), January 17, 2005, para. 31: “[T]he Trial Chamber and the Parties conducted an on-site visit to various locations in the Srebrenica, Bratunac and Zvornik municipalities in the Republika Srpska, Bosnia and Herzegovina on 14 and 15 September 2004. The purpose of this visit was to assist the Trial Chamber in assessing the evidence admitted in the case. The Trial Chamber did not take or admit any evidence during the site visit.”

xvii) authenticity of documents

Halilović, (Trial Chamber), November 16, 2005, para. 21: “In order to assess the authenticity of documents, the Trial Chamber considered evidence as to the source and chain of custody. The Trial Chamber did not consider unsigned, undated or unstamped documents, *a priori*, to be void of authenticity. Even when the Trial Chamber was satisfied of the authenticity of a particular document, it did not automatically accept the statements contained therein to be an accurate portrayal of the facts. The Trial Chamber evaluated this evidence within the context of the Trial record as a whole.” *See also Blagojević and Jokić*, (Trial Chamber), January 17, 2005, para. 29 (same).

d) Precedent and appellate review

i) precedential value of prior decisions

(1) the Appeals Chamber should follow its previous decisions absent cogent reasons in the interests of justice

Delalić et al., (Appeals Chamber), February 20, 2001, para. 26: “Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in the [*sic*] *Tadić* was arrived at on the basis of the application of a wrong legal principle, or arrived at per incuriam. . . . [T]his Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadić* Appeal Judgement.”

Aleksovski, (Appeals Chamber), March 24, 2000, paras. 104-110: “The right of appeal is a component of the fair trial requirement” and “an aspect of the fair trial requirement is the right of an accused to have like cases treated alike.” “[I]n the interests of certainty and predictability, the Appeals Chambers should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.” The “legal principle,” or *ratio decidendi*, should be followed. However, “the obligation to follow that principle only applies in similar cases, or substantially similar cases,” *i.e.*, where “the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 178: “The Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reason in the interests of justice.”

(2) decisions of the Appeals Chamber are binding on Trial Chambers

Aleksovski, (Appeals Chamber), March 24, 2000, paras. 112-113: The Appeals Chamber held that the “*ratio decidendi* of its decisions is binding on Trial Chambers.”

Limaj et al., (Trial Chamber), November 30, 2005, para. 178: “The status of the decisions of the Appeals Chamber was established in the *Aleksovski* Appeal Judgement. Pursuant to this decision, the *ratio decidendi* of the decisions of the Appeals Chamber is binding on Trial Chambers Contrary to the submissions of the Defence, Trial Chambers may not depart from previous rulings of the Appeals Chamber.”

(3) decisions of Trial Chambers have no binding force on each other

Aleksovski, (Appeals Chamber), March 24, 2000, para. 1114: “[D]ecisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.”

ii) appellate review

(1) generally

(a) standard for appeal: showing an error of law invalidating the decision or an error of fact that occasioned a miscarriage of justice

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 14: “On appeal, the Parties must limit their arguments to legal errors, which invalidate the decision of the Trial Chamber and to factual errors, which occasion a miscarriage of justice within the scope of Article 25 of the Statute. These criteria have been frequently referred to and are well established by the Appeals Chamber of both the ICTY and the ICTR.” *See also Kordić and Čerkez*, (Appeals Chamber), December 17, 2004, para. 14 (similar); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 12 (similar); *Đeronjić*, (Appeals Chamber), July 20, 2005, para. 7 (similar).

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 608: “Article 25 of the Statute states:

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.

... On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute.” See also *Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 5 (similar).

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 13: “Article 25 of the Statute provides for appeals on grounds of an error of law that invalidates the decision or an error of fact which has occasioned a miscarriage of justice.” See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 244 (similar); *Kvočka et al.*, (Appeals Chamber), February 28, 2005, para. 608 (similar); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 690 (similar).

(b) appeal is not a trial *de novo*

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 608: “As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases; it does not involve a trial *de novo*.” See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 21 (similar).

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 5: “The appeals procedure provided for under Article 25 of the Statute is corrective and does not give rise to a *de novo* review of the case.”

(c) form of submissions: party must explain how error renders the Trial Chamber decision invalid

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 15: “The Appellant has the obligation to set out his grounds of appeal clearly, and to provide the Appeals Chamber with specific references to the alleged errors of the Trial Judgement and to the parts of the record he is using to support his case. The Appeals Chamber cannot be expected to distil the Appellant’s legal arguments from vaguely pleaded suggestions of legal error mentioned in passing that are connected with factual arguments.”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 425: “The Appeals Chamber recalls that an appellant is obliged to clearly set out his grounds of appeal as well as the arguments supporting them. He has to provide the Appeals Chamber with exact references to paragraphs in judgements, transcript pages, exhibits or any authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made, so that the Appeals Chamber may fulfil its mandate in an efficient and expedient manner. General references to the submissions made during the

trial clearly do not fulfil this requirement, and therefore will be disregarded by the Appeals Chamber.”

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 22-23: “As set out in Article 25 of the Statute, the Appeals Chamber’s mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In a primarily adversarial system, like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. The parties have to present their case clearly, logically and exhaustively so that the Appeals Chamber can fulfil its mandate in an efficient and expeditious manner. Furthermore, ‘the Appeals Chamber cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.’”

“In order for the Appeals Chamber to assess the parties’ arguments, the parties are expected to provide precise references to relevant transcript pages or paragraphs in the judgement to which the challenge is being made. The parties must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must also be given references to exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made.”

Vasiljević, (Appeals Chamber), February 25, 2004, para. 12: “[T]he Appeals Chamber cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies. An allegation of an error of law which has no reasonable prospect of invalidating the decision may be summarily rejected. A party alleging an error of fact must explain what the alleged error is and why it a reasonable trier of fact could not make this finding and in what way it leads to a miscarriage of justice.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 10: “[T]he party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised is not *a priori* legitimate and may therefore be rejected on that ground.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 16: “As regards the formal requirements, the Appeals Chamber in the *Kunarac* Appeals Judgement specified that it cannot be expected to consider the parties’ claims in detail if they are obscure, contradictory or vague or if they are vitiated by other blatant formal defects. . . . The party appealing must therefore set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with specific references to the sections of the appeal case it is putting forward in support of its claims.”

(d) Appeals Chamber maintains discretion to determine which submissions warrant a reasoned written response

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 15: “The Appeals Chamber recalls at the outset that it maintains a discretion under Article 25 of the Statute to determine which of the parties’ submissions warrant a reasoned written response.” *See also Krujelac*, (Appeals Chamber), September 17, 2003, para. 16 (similar).

(i) Appeals Chamber may dismiss arguments clearly without foundation without detailed reasoning

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 15: “If an argument is clearly without foundation, the Appeals Chamber is not required to provide a detailed written explanation of its position with regard to that argument. Therefore, the Appeals Chamber may decide not to consider arguments which are not directly pleaded as grounds of appeal or to reject, without detailed reasoning, arguments that are obviously ill-founded.”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 21: “A party cannot merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits. Thus, in principle, the Appeals Chamber will dismiss, without providing detailed reasons, those submissions which are evidently unfounded.” *See also Blaskic*, (Appeals Chamber), July 29, 2004, para. 13 (similar); *Krujelac*, (Appeals Chamber), September 17, 2003, para. 16 (similar).

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 11: “The Appeals Chamber recalls that the formal criteria require an appealing party to provide the Appeals Chamber with exact references to the parts of the records, transcripts, judgements and exhibits to which reference is made. In the *Kunarac* Appeals Judgement, the Appeals Chamber found that:

[I]n principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those Appellants’ submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded. Objections will be dismissed without detailed reasoning where:

1. the argument of the appellant is clearly irrelevant;
2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; or
3. the appellant’s argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.”

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 12: “Where an appellant only challenges the Trial Chamber’s findings and suggests an alternative assessment of the evidence, without indicating in what respects the Trial Chamber’s assessment of the evidence was erroneous, then the appellant will have failed to discharge the burden incumbent upon him. In such circumstances, the Appeals Chamber may dismiss the arguments without a reasoned opinion.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 16: “The Appeals Chamber does not have to provide a detailed written explanation of its position with regard to arguments which are clearly without foundation. It must focus its attention on the essential issues of the appeal. In principle, therefore, it will reject without detailed reasoning arguments raised by the Appellants in their briefs or at the appeal hearing if they are obviously ill-founded.”

Compare discussion of “reasoned opinion in writing required,” Section (X)(d)(ii)(6), ICTY Digest.

(e) Appeals Chamber may affirm, reverse, or revise Trial Chamber decisions

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 5: “The Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chamber.”

(2) overview of review standards

Blaskic, (Appeals Chamber), July 29, 2004, para. 24: “[T]he Appeals Chamber sets out the following summary concerning the standard of review to be applied on appeal by the International Tribunal in relation to findings challenged only by the Defence, in the absence of a Prosecution appeal, as in the present case.

(a) The Appeals Chamber is confronted with an alleged error of fact, but the Appeals Chamber has found no error in the legal standard applied in relation to the factual finding. No additional evidence has been admitted on appeal in relation to that finding. The Appeals Chamber will determine whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If a reasonable trier of fact could have reached such a conclusion, then the Appeals Chamber will affirm the finding of guilt.

(b) The Appeals Chamber is confronted with an error in the legal standard applied in relation to a factual finding, and an error of fact has been alleged in relation to that finding. No additional evidence has been admitted on appeal in relation to that finding. The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt.

(c) The Appeals Chamber is confronted with an alleged error of fact, and – contrary to the scenario described in (a) – additional evidence has been admitted on appeal. There is no error in the legal standard applied in relation to the factual finding. There are two steps involved.

(i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.

(d) The Appeals Chamber is confronted with an error in the legal standard applied in relation to the factual finding and an alleged error of fact, and – contrary to the scenario described in (b) – additional evidence has been admitted on appeal. There are two steps involved.

(i) The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt.”

For criticism of aspects of this test, see “whether the Appeals Chamber should evaluate that it is convinced beyond reasonable doubt as to guilt in light of additional evidence,” Section (X)(d)(ii)(4)(b)(iv), ICTY Digest.

For more detail as to these standards, see “errors of fact,” Section (X)(d)(ii)(3), ICTY Digest; “errors of fact where ‘fresh’/additional evidence is proffered,” Section (X)(d)(ii)(4), ICTY Digest; “errors of law,” Section (X)(d)(ii)(5), ICTY Digest.

(3) errors of fact

(a) standard is one of reasonableness: whether no reasonable trier of fact could have reached the verdict of guilty beyond a reasonable doubt

Krocka et al., (Appeals Chamber), February 28, 2005, para. 18: “The standard of review in relation to alleged errors of fact applied by the Appeals Chamber is one of reasonableness. When considering alleged errors of fact as raised by the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.” *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 18 (similar) & para. 230 (same); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 16 (similar).

Krocka et al., (Appeals Chamber), February 28, 2005, para. 18: “The Appeals Chamber will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.” *See also Vasic*, (Appeals Chamber), February 25, 2004, para. 7 (similar).

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 24: “Whenever the Appeals Chamber is confronted with an alleged error of fact and the Appeals Chamber has found no error in the legal standard applied in relation to the factual finding, it will proceed as follows:

- When considering an alleged error of fact raised by the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt. If a reasonable trier of fact could have reached such a conclusion, then the Appeals Chamber will affirm the verdict of guilt. . . .”

See also Blaskic, (Appeals Chamber), July 29, 2004, para. 24 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 12: “[W]hen considering this type of error the Appeals Chamber applies the ‘reasonable nature’ criterion to the impugned finding. Only in cases where it is clear that no reasonable person would have accepted the evidence on which the Trial Chamber based its finding or when the assessment of the evidence is absolutely wrong can the Appeals Chamber intervene and substitute its own finding for that of the Trial Chamber.”

Tadic, (Appeals Chamber), July 15, 1999, para. 64: “[T]he standard to be used when determining whether the Trial Chamber’s factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached.”

(b) the Appeals Chamber will only intervene where there has been a “miscarriage of justice”

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 18: “It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a Trial Chamber, but only one which has caused a miscarriage of justice, which has been defined as a ‘grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.’” *See also Vasiljević*, (Appeals Chamber), February 25, 2004, para. 8 (same).

Kordić and Čerkez, (Appeals Chamber), December 17, 2004, para. 19: “Only errors of fact which have ‘occasioned a miscarriage of justice’ will result in the Appeals Chamber overturning the Trial Chamber’s decision. The appealing party alleging an error of fact must, therefore, demonstrate precisely not only the alleged error of fact but also that the error caused a miscarriage of justice, which has been defined as ‘[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.’”

Krstić, (Appeals Chamber), April 19, 2004, para. 40: “[T]he erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.”

Krnjelai, (Appeals Chamber), September 17, 2003, paras. 11, 13: “As regards errors of fact, the party alleging this type of error in support of an appeal against a conviction must provide evidence both that the error was committed and that this occasioned a miscarriage of justice.” “The party alleging a miscarriage of justice must, in particular, establish that the error strongly influenced the Trial Chamber’s decision and resulted in a flagrant injustice, such as where an accused is convicted despite lack of evidence pertaining to an essential element of the crime.”

(c) The Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 19: “The Appeals Chamber bears in mind that in determining whether or not a Trial Chamber’s finding was reasonable, it ‘will not lightly disturb findings of fact by a Trial Chamber.’” *See also Blaskić*, (Appeals Chamber), July 29, 2004, para. 17 (same).

Krstić, (Appeals Chamber), April 19, 2004, para. 40: “It is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.”

(d) a “margin of deference” is due to the Trial Chamber, which has the primary task of hearing, assessing and weighing the evidence

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 19-20: “The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreskic et al.*, wherein it was stated that:

Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is ‘wholly erroneous’ may the Appeals Chamber substitute its own finding for that of the Trial Chamber.”

“The Appeals Chamber considers that there are no reasons to depart from the standard set out above.” See also *Blaskic*, (Appeals Chamber), July 29, 2004, para. 17 (quoting same).

Kvočka et al., (Appeals Chamber), February 28, 2005, para. 427: “It has of course to be borne in mind that, as the Appeals Chamber has noted several times, the task of hearing, assessing and weighing the evidence is left primarily to the Trial Chamber:

The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’s testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.”

See also *Krnjelac*, (Appeals Chamber), September 17, 2003, para. 11 (similar).

Krstic, (Appeals Chamber), April 19, 2004, para. 40: “Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial”

Tadic, (Appeals Chamber), July 15, 1999, para. 64: “The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.”

See also *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 19: “The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber.”

(i) application—“margin of deference”: where subtle line between knowledge of intent and sharing of intent, determination should be left to Trial Chamber

Krstic, (Appeals Chamber), Partial Dissenting Opinion of Judge Shahabuddeen, April 19, 2004, paras. 38-39: “The line between knowledge of intent and a sharing of intent can be a subtle one. It turns on an appreciation of the evidence. In accordance with settled principles regulating the appeal process, the appreciation should be left to the Trial Chamber – even in the case of a stringent test. A stringent test does not empower the Appeals Chamber to step in where otherwise it could not. This is so except in cases of error - often qualified as having to be clear. I am not able to see any error here.” “Having agreed with the Trial Chamber in rejecting the appellant’s claim that there was a parallel line of authority from which he was totally excluded, having recognized that the personnel and resources in question were under the appellant’s command, having acknowledged that the appellant knew that his personnel and resources were being used to carry out the executions, having spoken of the appellant ‘allowing’ his resources to be so used and of such use being ‘permitted’ by him, the Appeals Chamber was not in a good position to reject the Trial Chamber’s finding that the appellant not only had knowledge of the executions but that he also shared the intent of the executions [and should be convicted of genocide, as a participant in a joint criminal enterprise, and not merely as an aider and abettor].”

(e) multiple reasonable interpretations of evidence are possible

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 288: “The Appeals Chamber notes that the International Tribunal’s law on appellate proceedings, namely whether ‘no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt,’ permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial. The Appeals Chamber has recognised that such circumstances may exist where multiple reasonable findings are possible:

[t]he Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any

reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding” (emphasis in original)

See also Krnojelac, (Appeals Chamber), September 17, 2003, para. 12 (source of quoted language).

For discussion of the fact that inferences are only permissible where they are the only reasonable inference available on the evidence, see “inferences,” Section (X)(c)(iii), ICTY Digest. For discussion of the fact that a conclusion based on circumstantial evidence must be the only reasonable conclusion available, see “circumstantial evidence,” Section (X)(c)(vii), ICTY Digest.

(f) review of Trial Chamber decisions regarding the admission of evidence

Krvocka et al., (Appeals Chamber), February 28, 2005, para. 128: “The Appeals Chamber observes that ‘a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable.’”

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 232: “The determination of whether the admission of a particular piece of evidence is precluded, under the circumstances, by the need to ensure a fair trial, is one which lies within the discretion of the Trial Chamber. The Appeals Chamber will revise such a determination only where the party challenging it has demonstrated that no reasonable trier of fact could have reached the conclusion.”

For sample rulings regarding particular exhibits, see *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, paras. 227-240. For discussion of the decision to admit the record of the accused’s voluntary interview with the prosecution into evidence, see *Krvocka et al.*, (Appeals Chamber), February 28, 2005, paras. 122-128.

(g) where conviction may be overturned based on error of fact

Blaskic, (Appeals Chamber), July 29, 2004, paras. 18-19: “The Appeals Chamber concurs with the *Kupreskic* Appeal Judgement’s finding that:

... where the Appeals Chamber is satisfied that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was ‘wholly erroneous,’ it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.”

“The Appeals Chamber considers that there are no reasons to depart from the standard set out above, in relation to grounds of appeal alleging pure errors of fact and

when no additional evidence has been admitted on appeal. That standard shall be applied where appropriate in the present Judgement.”

(4) errors of fact where “fresh”/ additional evidence is proffered

(a) generally

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 222: “The Trial Chamber was . . . competent to admit fresh evidence brought by the Prosecution after its case in chief if the evidence in question satisfied the applicable criteria. The admission of fresh evidence is merely the Trial Chamber’s exercise of its discretionary powers to admit or exclude relevant evidence pursuant to Rules 89(C) and (D), taking into account both the probative value of that evidence and the need to ensure a fair trial.”

See *Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, footnote 306 (noting that in the *Kupreskic* Appeal, the terms “additional evidence,” “fresh evidence” and “new evidence” were used interchangeably).

(i) distinction between rebuttal and “fresh” evidence

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 221: “The distinction [between rebuttal and fresh evidence] is relevant for the following reason:

Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies.”

(ii) burden of proof

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 224: “The burden of demonstrating that the Trial Chamber erred in exercising its discretion with regard to the [test for admission of fresh/additional evidence] rests on the party alleging it.”

(b) test for the admission of “fresh”/ additional evidence

- (i) if party seeking to introduced evidence could have identified and presented it in the case in chief, not permitted later; Trial Chamber has discretion whether to admit evidence based on probative value and fairness**

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 222: “The Appeals Chamber established the standard for the admissibility of fresh evidence in the *Celebici* [a/k/a *Delalić*] Appeal Judgement:

The Appeals Chamber agrees that the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89 (D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.” (emphasis in original)

- (ii) if “fresh” evidence not admitted, or admitted but not credible or irrelevant, uphold conviction**

Krocka et al., (Appeals Chamber), February 28, 2005, para. 428: “[T]he Appeals Chamber will uphold a conviction on the basis that a reasonable trier of fact could have arrived at a conviction on the evidence on the trial record in two cases:

- (i) if there is no additional evidence admitted;
- (ii) if additional evidence is admitted, but upon further review, is found to be not credible or irrelevant, so that it could not have been a decisive factor in reaching the decision at trial.”

- (iii) if “fresh” evidence admitted on appeal and credible/relevant, determine whether no reasonable trier of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber and the additional evidence**

Krocka et al., (Appeals Chamber), February 28, 2005, para. 426: “[T]he Appeals Chamber has set out the applicable test [where additional evidence has been admitted] in the *Kupreskic et al.* Appeal Judgement:

The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.”

See also *Blaskic*, (Appeals Chamber), July 29, 2004, paras. 22 (quoting same language); *Kupreskic*, (Appeals Chamber), October 23, 2001, para. 75-76 (source of quoted language).

- (iv) whether the Appeals Chamber should evaluate that it is convinced beyond reasonable doubt as to guilt in light of “fresh”/additional evidence**

Krocka et al., (Appeals Chamber), February 28, 2005, para. 426: “In *Blaskic*, the Appeals Chamber cited and affirmed that test [from *Kupreskic*]. The Appeals Chamber noted that in the context of the *Kupreskic* case, the Appeals Chamber simply applied a deferential standard of review to the totality of the evidence admitted both at trial and on appeal, because the appellant had successfully established that no reasonable trier of fact could have reached a finding of guilt based on that evidence. However, as the Appeals Chamber in *Blaskic* further correctly noted, the Appeals Chamber in *Kupreskic* was not faced with the question of what test to apply where the outcome would be that in light of the trial evidence considered together with the additional evidence admitted on appeal, ‘a reasonable trier of fact could reach a conclusion of guilt beyond a reasonable doubt.’ In that case, the Appeals Chamber in *Blaskic* concluded that ‘it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal.’ Consequently, the Appeals Chamber in *Blaskic* answered the question left open in *Kupreskic*, further developing the test first articulated therein.

In reaching this conclusion, the Appeals Chamber in *Blaskic* underscored that such a standard of review [whether, in light of the trial evidence and additional evidence admitted on appeal, the Appeals Chamber is itself convinced beyond reasonable doubt as to the finding of guilt] is necessary in the interests of justice as well as for reasons of

due process when considering a case before this International Tribunal because, if any lower standard were to be applied, 'then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of the evidence relied upon in the case be reached by either Chamber beyond reasonable doubt.'" See *also Blaskić*, (Appeals Chamber), July 29, 2004, paras. 22-23 (similar).

Blaskić, (Appeals Chamber), July 29, 2004, para. 24: "[T]he Appeals Chamber sets out the following summary concerning the standard of review to be applied on appeal by the International Tribunal in relation to findings challenged only by the Defence, in the absence of a Prosecution appeal, as in the present case.

... (c) The Appeals Chamber is confronted with an alleged error of fact, and . . . additional evidence has been admitted on appeal. There is no error in the legal standard applied in relation to the factual finding. There are two steps involved.

(i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then *the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced* beyond reasonable doubt as to the finding of guilt.

(d) The Appeals Chamber is confronted with an error in the legal standard applied in relation to the factual finding and an alleged error of fact, and – contrary to the scenario described in (b) – additional evidence has been admitted on appeal. There are two steps involved.

(i) The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, *the Appeals Chamber*, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence and additional evidence admitted on appeal, *it is itself still convinced* beyond reasonable doubt as to the finding of guilt." (emphasis added)

But see Kivucka et al., (Appeals Chamber), Separate Opinion of Judge Weinberg de Roca, February 28, 2005, para. 8: "In the *Blaskić* Appeal Judgement, the Appeals Chamber departed from th[e] well-established approach [of the *Kupreskić et al.* Appeal Judgement] without articulating any cogent reasons for doing so. According to the *Blaskić* Appeal Judgement, when additional evidence is introduced on appeal, 'the Appeals Chamber will

determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.’ For the reasons I have already expressed in my Partially Dissenting Opinion in the *Blaskic* Appeal, I cannot agree with this approach, which accords no deference to the Trial Chamber and usurps the role of the trier of fact. The admission of additional evidence does not turn the Appeals Chamber into a Trial Chamber: our proper role is limited to assessing whether there has been an error of fact in the trial judgement occasioning a miscarriage of justice and does not extend to making independent factual findings beyond a reasonable doubt.”

But see Blaskic, (Appeals Chamber), July 29, 2004, Partial Dissenting Opinion of Judge Weinberg de Roca, paras. 1-2, 5-6: “After more than two years of trial, having heard 158 witnesses and having considered more than 1300 pieces of evidence, three experienced trial judges concluded that the Appellant was guilty beyond a reasonable doubt and sentenced him to forty-five years of imprisonment. The Appeals Chamber disagrees and reverses the judgement, sentencing the Appellant to nine years.”

“In my opinion, the Appeals Chamber is only able to reach this conclusion by disregarding the deference normally accorded to the trier of fact. In doing so, the Appeals Chamber announces a new standard of review. This new standard empowers the Appeals Chamber to independently assess whether ‘it is itself convinced beyond reasonable doubt as to the finding of guilt.’ . . .

“It is well established that the Appeals Chamber should not lightly overturn a Trial Chamber’s findings of fact. The reasons for this deference are obvious and are fundamental to the conceptual distinction between the trial of first instance and the appeal. It is the judges of the Trial Chamber who are uniquely positioned to evaluate and assess the evidence, having been immersed in the case over a long period of time. The judges at trial have the distinct advantage of observing the witnesses in person. They are best placed to assess a witness’s demeanour and are able to question witnesses directly. Even where additional evidence is admitted on appeal, the Appeals Chamber hears only a very small percentage of the total witnesses. In this case, the Appeals Chamber heard six witnesses over four days and admitted 108 pieces of evidence, compared to the Trial Chamber’s 158 witnesses and 1300 pieces of evidence.”

“I accept that in cases involving additional evidence, the Appeals Chamber is less deferential because it becomes the primary trier of fact in relation to the new evidence. It should nevertheless still defer, to the extent possible, to the Trial Chamber’s evaluation of the evidence in relation to matters unaffected by the additional evidence, such as the credibility or reliability of witnesses who testified at trial.”

**(v) whether the Appeals Chamber should evaluate
the totality of the record when evaluating
additional evidence**

Blaskic, (Appeals Chamber), July 29, 2004, para. 20: “When factual errors are alleged on the basis of additional evidence proffered during the appellate proceedings, Rule 117 of the Rules provides that the Appeals Chamber shall pronounce judgement ‘on the basis of the record on appeal together with such additional evidence as has been presented to it.’”

But see Blaskic, (Appeals Chamber), Partial Dissenting Opinion of Judge Weinberg de Roca, July 29, 2004, paras. 10-11, 14: “[T]he Appeals Chamber must evaluate the probative weight to be accorded to additional evidence in light of the totality of the evidence on the record of the trial and the appeal. This is even more important if the standard of review proposed by the Appeals Chamber were to be accepted. However, as the Appeals Chamber acknowledges, it limits its evaluation of the evidence to those portions of the record cited in the Trial Judgement or by the parties on appeal. The Appeals Chamber states, with no justification for its approach, that:

The Appeals Chamber reiterates that an appeal is not a trial *de novo*. In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal.”

“This approach is contrary to the Rules of Procedure and Evidence (‘Rules’). Rule 115(B) of the Rules requires the Appeals Chamber to consider ‘the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.’ Rule 117(A) of the Rules explicitly states that ‘[t]he appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it.’ The record on appeal is defined in Rule 109 of the Rules as consisting of ‘the trial record, as certified by the Registrar.’ The record is not limited to the materials referred to in the trial judgement or by the parties; it is the *entire* trial record.”

“The Appeals Chamber’s failure to consider the entire record also results in an exaggerated understanding of the novelty of the additional evidence and leads the Appeals Chamber to erroneously assume that the additional evidence is something that was not considered by the Trial Chamber.” (emphasis in original)

See also Krucka et al., (Appeals Chamber), Separate Opinion of Judge Weinberg de Roca, February 28, 2005, paras. 7-9, 11 (similar).

(c) grounds for Trial Chamber to exclude late evidence

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 190-191: “The Trial Chamber . . . excluded a large number of [new] exhibits from admissibility for various reasons, *inter alia*. (1) the document(s) had already been admitted; (2) the material had already been produced in other proceedings before the International Tribunal and therefore had been available to the Prosecution when it presented its case; (3) the material was not sufficiently significant to warrant admission at so late a stage of the proceedings; (4) the material was cumulative and did not add to the voluminous material already in evidence; or (5) the material was based on anonymous sources or hearsay statements that were incapable of then being tested by cross-examination. Furthermore, the probative value of some of the evidence was found to be so reduced that it is substantially outweighed by the need to ensure a fair trial; ‘to admit it at this stage of the proceedings would violate the accused’s right to a fair trial’ as the Defence would have had no opportunity to cross-examine witness.” “In connection with Cerkez’s general allegations of the Prosecution’s late and new disclosure of evidence, the Appeals Chamber does not find that the Prosecution disclosed evidence late so as to ambush the Accused. The Prosecution has amply demonstrated that circumstances beyond its control were at play in securing evidence from the Republic of Croatia.”

(5) errors of law

(a) must be an error invalidating the decision

Kročka et al., (Appeals Chamber), February 28, 2005, para. 16: “Any party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised may therefore be rejected on that ground. However, if the arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and for other reasons find in favour of the contention that there is an error of law.” *See also Kordić and Cerkez*, (Appeals Chamber), December 17, 2004, para. 16 (similar); *Vasićević*, (Appeals Chamber), February 25, 2004, para. 6 (same as *Kordić*); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 14 (similar).

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 15: “Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the International Tribunal, must determine whether an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a Trial Chamber’s decision when there is an error of law ‘invalidating the decision.’ Therefore, not every error of law leads to a reversal or revision of a decision of a Trial Chamber.”

Blaskic, (Appeals Chamber), July 29, 2004, para. 14: “The Appeals Chamber recalls, as a general principle, that in respect of an alleged error of law:

...the Appeals Chamber [...] is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. The case-law recognises that the burden of proof on appeal is not absolute with regard to errors of law. The Appeals Chamber does not review the Trial Chamber’s findings on questions of law merely to determine whether they are reasonable but rather to determine whether they are correct. Nevertheless, the party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 6: “Article 24(1) of the Statute refers only to the errors of law *which render the decision invalid*, that is errors on a point of law which, if proven, affect the guilty verdict.” (emphasis in original)

(b) Appeals Chamber will correct errors of law and apply evidence contained in the trial record

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 24: “Whenever the Appeals Chamber is confronted with an error in the legal standard applied in relation to a factual finding, and an error of fact has been alleged in relation to that finding, it will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the verdict of guilt.” See also *Krvocka et al.*, (Appeals Chamber), February 28, 2005, para. 17 (similar); *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 17 (similar); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 15 (similar); *Blaskic*, (Appeals Chamber), July 29, 2004, para. 24 (similar).

Krnjelac, (Appeals Chamber), September 17, 2003, para. 10: “With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. The case-law recognises that the burden of proof on appeal is not absolute with regard to errors of law. The Appeals Chamber does not review the Trial Chamber’s findings on questions of law merely to determine whether they are reasonable but rather to determine whether they are correct.”

Compare *Kordic and Cerkez* (Appeals Chamber), Separate Opinion of Judge Weinberg De Roca, December 17, 2004, para. 3: “The standard of review of errors of law set out by the Appeals Chamber suggests that whenever the Appeals Chamber corrects an error of law it must apply this standard to the evidence contained in the trial record in order to ‘determine whether it is itself convinced beyond reasonable doubt as to the factual

finding challenged by the Defence, before that finding is confirmed on Appeal.’ This approach accords no deference to the factual findings already made by the Trial Chamber. In my opinion, when applying a corrected legal standard, the Appeals Chamber should first look to the findings made by the Trial Chamber because in many instances the Trial Chamber will already have made the factual findings necessary to satisfy the corrected legal standard. The Appeals Chamber should only determine whether it is satisfied beyond a reasonable doubt as to the Appellant’s guilt on the basis of a corrected legal standard when the Trial Chamber has not already made sufficient findings to satisfy that test. In reviewing the record, the Appeals Chamber should also rely, to the extent possible, on the Trial Chamber’s findings on related matters such as the credibility and reliability of evidence.”

(c) Appeals Chamber may raise errors of law *proprio moto* particularly regarding issues of general importance for the Tribunal’s case-law or functioning/ in the interests of justice

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, para. 1031: “[T]he jurisprudence of the International Tribunal accepts that ‘there are situations where the Appeals Chamber may raise questions *proprio moto* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.’ The Appeals Chamber’s role as the final arbiter of the law applied by the International Tribunal means that it must give the Trial Chambers guidance in their interpretation of the law.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 6: “[T]he case-law of the *ad hoc* tribunals accepts that there are situations where the Appeals Chamber may raise questions *proprio moto* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.”

Krnjelac, (Appeals Chamber), September 17, 2003, para. 7: “In the *Tadić* case, the Prosecution invoked several grounds of appeal, three of which raised issues of general importance for the case-law or functioning of the Tribunal. The Prosecution acknowledged that the Appeals Chamber’s decision would not influence the Trial Chamber’s verdict on the relevant counts. Yet the Appeals Chamber considered that it was competent to deal with issues which, although they do not affect the verdict handed down by a Trial Chamber, are of general importance for the Tribunal’s case-law. The main concern is to ensure the development of the Tribunal’s case-law and the standardisation of the applicable law. It is appropriate to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal’s case-law and it involves an important point of law that merits examination. This is because the Appeals Chamber must give the Trial Chambers guidance in their

interpretation of the law. This role of final arbiter of the law applied by the Tribunal should be seen in the light of the Tribunal's specific character and, in particular, of its *ad hoc*, temporary nature.”

See, e.g., *Jokić - Miodrag*, (Appeals Chamber), August 30, 2005, para. 26: “The Appeals Chamber is aware that this issue of concurrent convictions has not been appealed by either party and that the Appellant appealed only his sentence. There is, however, an insoluble nexus between a conviction and a sentence. Also, in the case of an error of law the Appeals Chamber has the discretionary power to correct this error *proprio motu* if the interests of justice so require. As the Appeals Chamber held in the *Musić et al* case, ‘[a]s part of the [International] Tribunal, [the Appeals Chamber] also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.’ Thus, the Appeals Chamber has the discretionary power to correct an error of law in relation to the issue of concurrent convictions for individual and superior responsibility.”

(6) reasoned opinion in writing required

Babić, (Appeals Chamber), July 18, 2005, para. 17: “Pursuant to Article 23(2) of the Statute, a judgement of a Trial Chamber ‘shall be accompanied by a reasoned opinion in writing.’ As noted in the *Furundžija* Appeal Judgement, the right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute. It does not oblige a Trial Chamber to make a finding, as suggested by the Appellant, for the ‘historical record.’ The requirement of a reasoned opinion in writing ‘enables a useful exercise of the right of appeal available to the person convicted’ and ‘allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of the evidence.’”

Kročka et al., (Appeals Chamber), February 28, 2005, para. 23: “The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98ter(C) of the Rules. However, this requirement relates to the Trial Chamber’s Judgement; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 380: “[T]he Appeals Chamber recalls that the degree of flexibility that must be accorded to a Trial Chamber in setting out its reasoning is always limited by the obligation to provide a reasoned explanation of its decision, which is a matter of fundamental fairness for all the parties concerned”

(a) no error where Trial Chamber does not cite to all evidence in its judgment/ Trial Chamber not required to articulate every step of reasoning

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, paras. 70, 71, 73, 79: “The Appellant alleges that the Trial Chamber erred in law and in fact and abused its discretion by failing to consider the totality of the evidence presented by the parties in relation to his good character and professionalism.” “[H]e submits that [the Trial Chamber] failed to take into account [relevant] parts of the testimony [of a certain witness].” “The Appeals Chamber finds that the Trial Chamber did not commit an error in not expressly referring to further portions of the testimony in question. Trial Chambers are not required to ‘articulate every step’ of their reasoning in reaching particular findings, and ‘failure to list in [a judgement] each and every circumstance placed before them and considered, does not necessarily mean that [they] either ignored or failed to evaluate the factor in question.’ A Trial Chamber is in no way obliged to refer to every phrase pronounced by a witness during his testimony but may, where it deems appropriate, stress the main parts of the testimony relied upon in support of a finding. That the Sentencing Judgement refers only to some parts of [the] testimony does not support the contention that the other parts of his testimony were rejected or not taken into account by the Trial Chamber. To the contrary, reference to a certain portion of the witness’s testimony is *prima facie* evidence that the Trial Chamber was cognisant of the whole testimony and took it into account.” “[T]he Trial Chamber did not have to include every portion of the testimony heard in the Sentencing Judgement . . .”

Deronjic, (Appeals Chamber), July 20, 2005, para. 21: “The Appeals Chamber recalls that, in general, a Trial Chamber is not obliged to refer to every piece of evidence in the trial record in its judgement nor to every submission made during the trial. If the evidence cited does not directly support the facts on which the Trial Chamber’s challenged finding is based, the determination as to whether the Trial Chamber made an error must be considered on a case-by-case basis and in light of all the evidence before it.”

Kročka et al., (Appeals Chamber), February 28, 2005, para. 23: “It is not necessary [for the Trial Chamber] to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber’s reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective.” See also *Kročka et al.*, (Appeals Chamber), February 28, 2005, para. 677 (similar); *Kordić and Čerkez*, (Appeals Chamber), December 17, 2004, para. 382 (similar).

Krocka et al., (Appeals Chamber), February 28, 2005, para. 24: “As an example of a complex issue, the Appeals Chamber considered the appraisal of witness testimony with regard to the identity of the accused:

While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a ‘reasoned opinion.’ In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence.

But even in those cases, the Trial Chamber is only expected to identify the *relevant* factors, and to address the *significant* negative factors. If the Defence adduced the evidence of several other witnesses, who were unable to make any meaningful contribution to the facts of the case, even if the conviction of the accused rested on the testimony of only one witness, the Trial Chamber is not required to state that it found the evidence of each Defence witness irrelevant. On the contrary, it is to be presumed that the Trial Chamber took notice of this evidence and duly disregarded it because of its irrelevance. In general, as the *Furundžija* Appeals Chamber stated:

The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that ‘the extent to which this duty . . . applies may vary according to the nature of the decision’ and ‘can only be determined in the light of the circumstances of the case.’”

(emphasis in original)

(b) Trial Chamber required only to make findings of fact that are essential

Krocka et al., (Appeals Chamber), February 28, 2005, para. 23: “With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count.” *See also Krocka et al.*, (Appeals Chamber), February 28, 2005, para. 288 (similar).

(c) findings of fact on undisputed facts or facts agreed upon by the parties need not be explicitly made

Babić, (Appeals Chamber), July 18, 2005, paras. 18, 22, 36: “A Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts. The reference by a Trial Chamber to such facts is by itself indicative that it accepts those facts as true.” “The Trial Chamber’s reference to [a certain] undisputed fact [in the Sentencing Judgement] is, in itself, – absent any indication in the Sentencing Judgement that it believed that fact to be untrue – indicative that it accepted it.” “The fact that the

Trial Chamber did not refer in the Sentencing Judgement to the remaining above-mentioned agreed facts [about Babic's limited participation in the joint criminal enterprise] does not mean, as alleged by the Appellant, that it ignored them. As previously stated, a Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts."

(d) not possible to draw inferences about the quality of a judgment from its length

Krocka et al., (Appeals Chamber), February 28, 2005, para. 23: "It is . . . not possible to draw any inferences about the quality of a judgement from the length of particular parts of a judgement in relation to other judgements or parts of the same judgement."

(e) appellant claiming an error of law because of lack of a reasoned opinion must identify the specific issues, factual findings or arguments that the Trial Chamber omitted to address

Krocka et al., (Appeals Chamber), February 28, 2005, para. 25: "The Appeals Chamber . . . emphasizes that it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision. General observations on the length of the Judgement, or of particular parts of the Judgement, or of the discussion of certain parts of the evidence, do not qualify, except in particularly complex cases, as the basis of a valid ground of appeal." *See also Krocka et al.*, (Appeals Chamber), February 28, 2005, para. 447 (same).

(f) failure to make specific factual findings regarding each element of the crimes was error

Kordic and Cerkez, (Appeals Chamber), December 17, 2004, paras. 383-387: "[I]his approach [of not discussing each and every piece of evidence] does not relieve the Trial Chamber from its obligation pursuant to Article 23(2), sentence 2, of the Statute, translated into Rule 98ter (C), sentence 2, of the Rules to give a reasoned opinion, meaning that all the constituent elements of a crime have to be discussed and supporting evidence has to be assessed by the Trial Chamber."

"The Appeals Chamber notes that the Trial Chamber did not in most cases make specific explicit factual findings with regard to each element of the crimes, but expressly concluded that the crimes were established. The Appeals Chamber considers that by finding that the crimes were established, the Trial Chamber implicitly found all the relevant factual findings required to cover the elements of the crimes."

"However, the Appeals Chamber considers that such an approach falls short of

what is required. The Trial Judgement must enable the Appeals Chamber to discharge its task pursuant to Article 25 of the Statute based on a sufficient determination as to what evidence has been accepted as proof of all elements of the crimes charged, and, if discussed, its assessment of, *inter alia*, the credibility and demeanour of a witness. Relying in part on a catch-all phrase cannot substitute *[sic]* the Trial Chamber's obligation to give 'a reasoned opinion in writing' as envisaged in the afore-mentioned Article 23(2), sentence 2, of the Statute."

"The Appeals Chamber considers, however, that this does not automatically lead to a dismissal of the charges and agrees with the Prosecution that, in this particular circumstance, the issue before it is to establish whether the Trial Chamber's findings that the crimes were established, are sustained on the record."

"The failure of the Trial Chamber to discuss all constituent elements of all crimes charged and to request the Prosecution to further amend the Indictment has forced the Appeals Chamber to reassess a plethora of evidence in order to find out whether or not all constituent elements of the crimes were established during trial"

(g) failure to make factual findings as to each incident contained in schedules to the indictment was error

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 69-71, 73-75: "The overall conclusions [regarding the running of the Omarska camp] reached by the Chamber are contained in paragraphs 116 and 117 of the Trial Judgement:

116. The evidence is overwhelming that abusive treatment and inhumane conditions in the camps were standard operating procedure. Camp personnel and participants in the camp's operation rarely attempted to alleviate the suffering of detainees. Indeed, most often those who participated in and contributed to the camp's operation made extensive efforts to ensure that the detainees were tormented relentlessly. Many detainees perished as a result of the inhumane conditions, in addition to those who died as a result of the physical violence inflicted upon them.

117. The Trial Chamber finds that the non-Serbs detained in these camps were subjected to a series of atrocities and that the inhumane conditions were imposed as a means of degrading and subjugating them. Extreme brutality was systematic in the camps and utilized as a tool to terrorize the Muslims, Croats, and other non-Serbs imprisoned therein."

"The Trial Chamber then turned to the applicable law and legal findings before looking at the criminal responsibility of each accused in turn. This approach is different from that adopted by the *Krnjelac* Trial Chamber, which, seised of a similarly structured indictment, first made factual findings in relation to each incident listed in the schedules annexed to the indictment before looking at the responsibility of the accused. Similarly, in the *Galić* Trial Judgement, the Trial Chamber established whether the shelling or sniping incidents recounted in the schedules annexed to the Indictment were established

beyond reasonable doubt before looking at the criminal responsibility of the accused himself.”

“With respect to these [general] conclusions [that each of the crimes alleged in the Amended Indictment were committed in Omarska camp], it is necessary to determine whether the Trial Chamber found that every incident listed in the Schedules had therefore been proven beyond reasonable doubt by the Prosecution and that the Accused were therefore guilty in respect to each incident listed therein.”

“The Appeals Chamber considers that a systematic approach, consisting of making factual findings in relation to each incident contained in the Schedules and underlying the crimes contained in the Indictment, would have been the appropriate approach. An accused is entitled to know whether he has been found guilty of a crime in respect of the alleged incidents under the principle of a fair trial.”

“However, the Appeals Chamber finds that the generic approach adopted by the Trial Chamber does not render the Judgement invalid. A conviction on any given count may be reached as long as there are findings as to one incident contained therein. . . . The language of the Indictment itself does not require that each and every incident be established beyond reasonable doubt before the accused can be found guilty under a certain count. . . . The Trial Chamber established beyond reasonable doubt that some instances of persecutions, murder, torture and cruel treatment had been committed against prisoners of the Omarska camp, including some victims listed in the Schedules.”

“The Appeals Chamber concludes that, even if the Trial Chamber made an error by failing to list the incidents established beyond reasonable doubt underlying each of the crimes for which the Appellants were found guilty, this error does not invalidate the Trial Judgement, as long as the Trial Chamber did actually make factual findings of individual crimes underlying the convictions of the Appellants. The Appeals Chamber will therefore not overturn any conviction for this reason, for which there are factual findings, provided that these facts had been pleaded in the Indictment.” *See also Krvocka et al.*, (Appeals Chamber), February 28, 2005, para. 356.

(7) issues not raised before Trial Chamber waived on appeal

Blaskic, (Appeals Chamber), July 29, 2004, para. 222: “As provided for in Article 25 of the Statute, the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice. A party is under the obligation to formally raise before the Trial Chamber, either during trial or pre-trial, any issues that require resolution. A party ‘cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*.’ If a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived his right to bring the issue as a valid ground of appeal.”

(a) application—issues not raised below waived

Blaskic, (Appeals Chamber), July 29, 2004, para. 223: “[T]he Appeals Chamber is not of the view that the Appellant – who objected to the adequacy of the indictment before the Trial Chamber – has waived his right to do so on appeal. The Appellant raised the issue of the vagueness of the Amended Indictment before the Trial Chamber, and subsequently challenged the Second Amended Indictment’s compliance with the Trial Chamber’s ruling, although he failed to raise the issue of the vagueness of the indictment on the question of the form of responsibility either at the Rule 98bis hearing in the case or in closing argument at trial.”

Compare Deronjic, (Appeals Chamber), July 20, 2005, paras. 101-103: Where issue of alleged double-counting of aggravating factors both as aggravating circumstances and part of the offence was not raised in the Notice of Appeal, the Appeals Chamber entertained the Appellant’s argument, as the Prosecution was not materially prejudiced: “The Appeals Chamber considers that in light of this lack of material prejudice and the potential importance of the arguments in question, if successful, for the sentence of the Appellant, the Appellant should be permitted to raise them in spite of his violation of Rule 108 of the Rules.”

e) Appellate Chamber review of sentencing judgments

i) sentencing appeals are not a trial *de novo*

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 7: “Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*, they are of a ‘corrective nature’ and are not trials *de novo*.” See also *Deronjic*, (Appeals Chamber), July 20, 2005, para. 7 (similar); *Babic*, (Appeals Chamber), July 18, 2005, para. 6 (similar); *Kivcka et al.*, (Appeals Chamber), February 28, 2005, para. 669 (similar); *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 8 (similar); *Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 9 (similar).

ii) sentencing appeals limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 7: “Pursuant to Article 25 of the Statute, the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice. These criteria have been frequently referred to and are well established in the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda (ICTR).” See also *Deronjic*, (Appeals Chamber), July 20, 2005, para. 7 (similar);

Babić, (Appeals Chamber), July 18, 2005, para. 6 (same as *Deronjić*); *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, para. 8 (similar).

iii) Trial Chambers are vested with broad discretion in determining an appropriate sentence

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 8: “Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.” See also *Deronjić*, (Appeals Chamber), July 20, 2005, para. 8 (similar); *Babić*, (Appeals Chamber), July 18, 2005, para. 7 (same); *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, para. 9 (same); *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, para. 15 (similar).

Kročka et al., (Appeals Chamber), February 28, 2005, para. 669: “Sentencing is essentially a discretionary process on the part of a Trial Chamber. The Appeals Chamber reiterates that “[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber.”

Vasićević, (Appeals Chamber), February 25, 2004, para. 9: “A Trial Chamber has considerable though not unlimited discretion when determining a sentence.”

iv) the weight to accord aggravating and mitigating factors is in the discretion of the Trial Chamber

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 57: “The Appeals Chamber emphasizes that, upon finding that mitigating circumstances have been established, a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber.”

Kročka et al., (Appeals Chamber), February 28, 2005, para. 675: “With respect to the weight to be afforded to mitigating circumstances, the jurisprudence of the International Tribunal is clear: the Trial Chamber has considerable discretion. It is incumbent upon the appellant to show that the Trial Chamber erred in exercising its discretion. Mere recital of mitigating factors without more does not suffice to discharge this burden.”

Nikolić - Dragan, (Appeals Chamber), February 4, 2005, para. 27: “The Appeals Chamber emphasises that while the Statute and the Rules do oblige Trial Chambers to take into account both the aggravating and the mitigating circumstances of a case, the determination of what can constitute an aggravating or a mitigating factor and what weight has to be attached to those is within their discretion.”

v) the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 8: “As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a ‘discernible error’ in exercising its discretion or has failed to follow the applicable law. It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.” See also *Deronjić*, (Appeals Chamber), July 20, 2005, para. 8 (same); *Babić*, (Appeals Chamber), July 18, 2005, para. 7 (similar); *Kročka et al.*, (Appeals Chamber), February 28, 2005, para. 669 (similar); *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, para. 9 (similar); *Blaskić*, (Appeals Chamber), July 29, 2004, para. 680 (similar); *Krstić*, (Appeals Chamber), April 19, 2004, para. 242 (similar); *Vasićević*, (Appeals Chamber), February 25, 2004, para. 9 (similar).

vi) a Trial Chamber’s decision may be disturbed on appeal if the Trial Chamber abused its discretion by taking into account what it ought not to have or by failing to take into account what it ought to have

Deronjić, (Appeals Chamber), July 20, 2005, para. 8: “[A] Trial Chamber’s decision may be disturbed on appeal if the Appellant shows that the Trial Chamber abused its discretion either by taking into account what it ought not to have or by failing to take into account what it ought to have taken into account in the weighing process involved in the exercise of its discretion.” See also *Nikolić - Dragan*, (Appeals Chamber), February 4, 2005, paras. 9 & 27 (similar).

vii) no “automatic credit” given for mitigating factors

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 57: “Proof of mitigating circumstances ‘does not automatically entitle [an] [a]ppellant to a ‘credit’ in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination.” See also *Babić*, (Appeals Chamber), July 18, 2005, para. 44 (same).

viii) an appellant challenging the weight given by a Trial Chamber to a particular mitigating factor bears the burden of demonstrating that the Trial Chamber abused its discretion

Babić, (Appeals Chamber), July 18, 2005, para. 44: “An appellant challenging the weight given by a Trial Chamber to a particular mitigating factor . . . bears ‘the burden of demonstrating that the Trial Chamber abused its discretion.’ The Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial

Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."

ix) while a Trial Chamber is required to take mitigating factors into account, it has no obligation to discuss each mitigating factor

Babić, (Appeals Chamber), July 18, 2005, para. 43: "The[] [trial chamber judges] are not required to 'articulate every step' of their reasoning in reaching particular findings, and failure to list in a judgement 'each and every circumstance' placed before them and considered 'does not necessarily mean that [they] either ignored or failed to evaluate the factor in question.' For instance, a Trial Chamber's express reference to the parties' written submissions concerning mitigating circumstances is *prima facie* evidence that it was cognisant of these circumstances and took them into account."

See, e.g., Kordić and Čerkez, (Appeals Chamber), December 17, 2004, paras. 1051-1052: "Under the Statute and the Rules of the International Tribunal, each Trial Chamber is required to take into account any mitigating circumstances. The Appeals Chamber is not satisfied, however, that the Trial Chamber committed a discernible error in failing to explicitly address [Kordić's motivation to become engaged in politics, his pre-war good character and his good reputation during and after the war]." "[T]he Trial Chamber's convictions and the seriousness of the offences demonstrate that the Trial Chamber did not err in failing to address Kordić's allegedly good reputation during and after the war." Similarly, the Trial Chamber did not err in ignoring 'Kordić's submission that he had no prejudice against citizens of other nationalities:' as the Trial Chamber correctly convicted him for persecutions and other crimes committed against Bosnian Muslims, the Appeals Chamber agrees with the Trial Chamber's assessment in not discussing at all manifestly ill-founded submissions."

See, e.g., Jokić - Miodrag, (Appeals Chamber), August 30, 2005, paras. 64, 65: "The Appeals Chamber observes that in . . . the Sentencing Judgement . . . , the Trial Chamber referred to the Appellant's family situation, including his marriage and his two daughters Moreover, in its discussion of the Appellant's personal circumstances, the Trial Chamber referred to the fact that the Appellant is married and has two children. In addition, the Appeals Chamber notes that, within this context, the Trial Chamber referred to a [relevant] portion of the Sentencing Hearing" "The Trial Chamber expressly referred to the Appellant's written submissions and cited the paragraph of the Defence Sentencing Brief which contains evidence presented by the Appellant to show that his personal circumstances were of an exceptional nature This reference in the Sentencing Judgement to the written submissions is *prima facie* evidence that the Trial Chamber was cognisant of the Appellant's specific personal and family situation and took it into account. The Appeals Chamber finds that the Trial Chamber was under no obligation to discuss the Appellant's personal circumstances in more detail than it did, in

particular in light of the fact that some of the evidence proffered by the Appellant concerning his family circumstances is of a confidential nature.”

x) whether new mitigating factors may be raised in the Appellant’s reply brief

Vasiljevic, (Appeals Chamber), February 25, 2004, para. 15: “The Appellant argues that the Trial Chamber did not consider his conduct, while in the detention of the International Tribunal, as a mitigating factor when determining his sentence. This argument was raised for the first time in the Defence Reply. The Appeals Chamber holds that replies should be limited only to arguments rebutting the response arguments and should not include new arguments or amendments of grounds already submitted. This argument will therefore not be considered.”

Compare Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 54: “The Appellant . . . submits that post-conflict conduct is a ‘separate and distinct mitigating circumstance’ that should not be ‘commingled with remorse.’ . . . The Appeals Chamber finds that this argument, advanced by the Appellant for the first time in his Brief in Reply, amounts to a new allegation. Nonetheless, the Appeals Chamber decides to exercise its discretionary power to briefly address the Appellant’s new argument.”

xi) raising on appeal mitigating factors beyond those set forth in the notice of appeal

Deronjic, (Appeals Chamber), July 20, 2005, para. 130: Where Appellant’s brief raised issued about mitigating factors beyond those set forth in the notice of appeal, “he was obligated to make an appropriate motion pursuant to Rule 108 of the Rules. However, under the circumstances of the case and having regard to the fact that the Prosecution addressed all the issues raised by the Appellant in its response, the Appeals Chamber decides to exercise its discretion and address on the merits the Appellant’s arguments.”

xii) Appeals Chamber may not consider mitigating factors that were available but not raised before the Trial Chamber

Deronjic, (Appeals Chamber), July 20, 2005, para. 150: “The Appeals Chamber notes that this issue [of the existence of additional mitigating circumstances] was not raised at the sentencing stage and that there is therefore no evidence on the basis of which the Appeals Chamber can consider this submission.” “[T]he Appeals Chamber emphasises that an appellant cannot expect the Appeals Chamber to consider on appeal evidence of mitigating circumstances which was available but not introduced in the first instance.”

Babic, (Appeals Chamber), July 18, 2005, para. 62: “[T]he Appellant submits that, during the period covered by the Indictment, he attempted to alleviate problems within the

prisons by appointing professional prison staff and that this was also ignored by the Trial Chamber. The Appeals Chamber notes that this argument was not included in the Appellant's Sentencing Brief, nor was it raised by the Defence in its oral submissions before the Trial Chamber. In fact, during the Appeal Hearing, the Defence did not deny that this argument was raised for the first time on appeal. There is no evidence on the basis of which the Appeals Chamber can consider this submission. The Trial Chamber therefore committed no error by not considering this factor in its assessment of the mitigating factors. In addition, the Appeals Chamber emphasises that an appellant cannot expect the Appeals Chamber to consider on appeal evidence of mitigating circumstances which was available but not introduced in the first instance."

See also Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 673-674: "Kvočka argues that he 'did not pay much attention' to presenting mitigating circumstances at trial given that he was of the opinion that there was insufficient evidence on which he could be convicted." "The Appeals Chamber notes that mitigating evidence was in fact adduced before the Trial Chamber. As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised. Rule 85(A)(vi) provides that a Trial Chamber will consider 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more charges in the indictment.' In this regard, the following passage from *Kupreskic* should be reiterated:

If an accused fails to put forward any relevant information, the Appeals Chamber does not consider that, as a general rule, a Trial Chamber is under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time."

xiii) Trial Chamber may rely on mitigating factors agreed upon by the parties where a plea was entered

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, paras. 40, 47: "The Appellant alleges that the Trial Chamber erred in law in deciding that, in the case of plea agreements, it would primarily rely on mitigating factors agreed upon by the parties since mitigating factors should be established by a defendant on the balance of probabilities and not by agreement between the parties." "The Appeals Chamber recalls that Trial Chambers are 'required as a matter of law to take account of mitigating circumstances.' The Appeals Chamber is not satisfied that the Trial Chamber wrongly departed from the 'balance of probabilities' standard set out in the *Celebici* [a/k/a *Delalić*] Appeal Judgement. Having recalled the standard in question, the Trial Chamber stated that, in cases of plea agreements, it would primarily rely on the mitigating factors agreed to by the parties. In other words, the Trial Chamber logically relieved the Appellant from discharging the burden of establishing mitigating circumstances on the balance of probabilities with respect to those mitigating circumstances agreed upon by the parties.

Further, . . . the Trial Chamber considered mitigating factors that the Appellant alone had identified.”

xiv) Appeals Chamber may revise/impose new sentence without remanding to the Trial Chamber

Kordić and Cerkez, (Appeals Chamber), December 17, 2004, paras. 1070-1072: “[Where] [t]he Appeals Chamber has significantly reversed the findings of the Trial Chamber and has granted several of Cerkez’s grounds of appeal, overturning most of the convictions,” but has additionally “found him guilty [of additional acts] pursuant to Article 7(1) of the Statute,” “the Appeals Chamber will itself find the adequate sentence for the remaining convictions.” “The Appeals Chamber is being called upon to mete out a sentence *de novo*. Thus, instead of reversing the sentence of the Trial Chamber, the Appeals Chamber will substitute its own reasoned sentence for that of the Trial Chamber on the basis of its own findings, a function which the Appeals Chamber can perform without remitting the case to a Trial Chamber.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 680: “If . . . the Appeals Chamber overturns one or more convictions on which the Trial Chamber had based a single sentence, the Appeals Chamber is competent to impose a single sentence – or concurrent sentences – for the remaining convictions. In doing so, the Appeals Chamber revises the sentence meted out by the Trial Chamber, although the latter did not necessarily commit a discernible error in the exercise of its sentencing discretion.”

Blaskić, (Appeals Chamber), July 29, 2004, para. 726: “Instead of revising the sentence of the Trial Chamber, the Appeals Chamber will substitute its own reasoned sentence for that of a Trial Chamber on the basis of its own findings, a function which the Appeals Chamber considers that it may perform in this case without remitting the case to the Trial Chamber.”

Krstić, (Appeals Chamber), April 19, 2004, para. 266: “In accordance with its power to do so without remitting the matter to the Trial Chamber, the Appeals Chamber proceeds with the adjustment of Krstić’s sentence in light of its findings, and in accordance with the requirements of the Statute and the Rules.”

Vasiljević, (Appeals Chamber), February 25, 2004, para. 181: “The Appeals Chamber considers that it has the mandate to revise the sentence by itself without remitting it to the Trial Chamber.”

xv) *proprio moto* re-qualifications of conviction based on error of law may not be to the detriment of the accused

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 26: “[T]he Appeals Chamber bears in mind that . . . a re-qualification of the conviction [correcting a conviction under

both Article 7(1) and Article 7(3) to only be a conviction under Article 7(1)], when it occurs *proprio motu* in a sentencing appeal proceeding, can never be to the detriment of the accused.”

xvi) application—Appellate Chamber review of sentencing judgments

(1) weight given to poor health, good character, lack of prior criminal convictions, cooperation with the Tribunal, and contribution to reconciliation in the former Yugoslavia

Krstic, (Appeals Chamber), April 19, 2004, paras. 271, 265: “The Defence submits that the Trial Chamber erred in not according any weight in sentencing to Krstic’s poor health, his good personal character, his clear record to date, and his cooperation with the Tribunal and contribution to reconciliation in the former Yugoslavia.” “The Trial Chamber considered the circumstances identified by the defence, but concluded that they did not constitute mitigating circumstances. The Trial Chamber has discretion in deciding whether a particular circumstance should be regarded as a mitigating one. The Defence has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion in this regard, and the ground of appeal is dismissed.” “The Appeals Chamber adopts the Trial Chamber’s findings as to these factors, and concludes that they do not constitute mitigating circumstances in the context of this case.”

(2) weight given to, *inter alia*, peace efforts

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, para. 58: “As to the Appellant’s argument that the Trial Chamber did not give ‘due weight to the fact that he participated directly with the leadership of the New Democracy party of Serbia on strategy of future reforms, reorganisation and strategy of the Yugoslav Armed Forces with the Partnership of Peace’ the Appeals Chamber notes that the Sentencing Judgement makes reference to the Defence’s submissions in this respect during the Sentencing Hearing. The Sentencing Judgement states that ‘the Prosecutor accepts that Miodrag Jokic was an active member of the New Democracy party and President for the Board for Defence and Security’ and that ‘the Prosecution recognizes that, in this capacity, Miodrag Jokic contributed significantly to the initiative for having the Federal Republic of Yugoslavia join the Partnership for Peace, and worked on proposals for the reform of the military and the police.’ Moreover, the Trial Chamber expressly referred to this information in the context of its discussion.”

(3) weight given to gravity of conduct and command position as an aggravating factor

Aleksavski, (Appeals Chamber), March 24, 2000, para. 187: “The Appeals Chamber held that “there was a discernible error in the Trial Chamber’s exercise of discretion in

imposing sentence” and “[t]hat error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1).”

(4) weight given to cooperation

Kvočka et al., (Appeals Chamber), February 28, 2005, paras. 722, 721, 723: “Rule 101(B) of the Rules provides that in determining the sentence, the Trial Chamber shall take into account *inter alia* ‘any mitigating circumstances including the *substantial* cooperation with the Prosecutor by the convicted person before or after conviction.’ It is for the Trial Chamber to assess whether the co-operation of the defendant is substantial, and the conclusion of the Trial Chamber will only be disturbed if it made a discernible error thereby stepping outside the bounds of its discretion.”

“Prcac . . . argues that his co-operation with the Prosecution and the Tribunal was not properly taken into account by the Trial Chamber.” “The Appeals Chamber observes that the Trial Judgement explicitly took ‘note of the fact that Prcac voluntarily gave a statement to the Prosecution.’ It further referred to Prcac’s submission on co-operation, thus constituting ‘*prima facie* evidence that [it was] taken into account.’ No reasoned arguments have been adduced in support of the proposition that insufficient weight was attached to these considerations.” (emphasis in original)

See also Blaskić, (Appeals Chamber), July 29, 2004, para. 702: “The Appeals Chamber does not consider as a discernible error the Trial Chamber’s omission to state expressly the weight it gave to the cooperation of the Appellant with the Prosecutor in relation to his sentence; the Trial Chamber’s analysis of this factor as a mitigating one was sound, and the Appeals Chamber agrees with the Trial Chamber that the Appellant’s voluntary surrender constitutes a mitigating factor.”

(5) weight given to personal circumstances

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 68: “[T]he Appellant has shown neither that the Trial Chamber abused its discretion in weighing mitigating circumstances [regarding the Appellant’s personal and family situation], nor that it ‘failed to follow [the] applicable law and correctly interpret and evaluate the facts.’ Rather, the Appeals Chamber finds that the Trial Chamber considered all the evidence before it concerning the Appellant’s personal circumstances, and that it was within its discretion to afford this factor ‘some, although very limited, weight in mitigation.’”

(6) weight given to personal circumstances for purposes of provisional release not necessarily relevant to assessing mitigating circumstances

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, paras. 66, 67: “The Appeals Chamber turns now to the Appellant’s argument that the Sentencing Judgement ‘erroneously describes the Appellant’s family circumstances and failed to properly consider his true family circumstances as a mitigating factor,’ which he supports by reference to the orders on his provisional release, in which the Trial Chamber considered that his extraordinary health and family considerations amounted to exceptional circumstances.” “The Appeals Chamber finds that the Trial Chamber’s considerations when granting the Appellant’s provisional release are not necessarily relevant to its assessment of the circumstances in mitigation of the Appellant’s sentence. Pursuant to Rule 65(B) of the Rules an accused may be provisionally released if the Trial Chamber is satisfied that he or she will appear for trial and, if released, will not pose a danger to any victim, witness or other person. When evaluating an accused’s conduct in order to mete out an appropriate sentence, it is open to a Trial Chamber to weigh the mitigating circumstances against other factors, such as, the gravity of the crime, the particular circumstances of the case and the form and degree of the participation of the accused in the crime. The Appeals Chamber considers that the Appellant’s argument under this part of his fifth ground of appeal is misconceived.”

(7) no error to consider post-conflict conduct as an expression of remorse

Jokić - Miodrag, (Appeals Chamber), August 30, 2005, para. 54: “The Appellant . . . submits that post-conflict conduct is a ‘separate and distinct mitigating circumstance’ that should not be ‘commingled with remorse.’ In his view, the negotiated ceasefire and his political activities in the New Democratic Party should be characterised as steps taken by the Appellant ‘to improve the situation and alleviate suffering’, which is a mitigating circumstance ‘separate and distinct from remorse.’ He adds that to consider these factors ‘as remorse is an abuse of discretion which creates an injustice to the Appellant.’ . . . The Trial Chamber took the Appellant’s post-conflict conduct into account as a factor in mitigation and considered it in its final determination, when it found that the Appellant’s remorse was a relevant mitigating circumstance ‘also shown by the conduct concomitant and posterior to the committed crimes.’ The Appeals Chamber finds that it was within the discretion of the Trial Chamber to consider the Appellant’s post-conflict conduct as an expression of his sincere remorse, instead of assessing his post-conflict conduct as a *distinct* mitigating circumstance. The Trial Chamber did not err in this respect.” (emphasis in original)

(8) no error to consider testimony as relevant to cooperation and remorse, not good character

Jokic - Miodrag, (Appeals Chamber), August 30, 2005, paras. 76, 79, 82: The Appellant argued that certain testimony should have been considered by the Trial Chamber as relevant to his good character and professionalism. The Appeals Chamber “acknowledges that the Trial Chamber referred to these passages of the transcript within the context of the Appellant’s cooperation with the Prosecution and not in relation to the Appellant’s good character and professionalism. However, the Appeals Chamber finds that the Trial Chamber did not err by addressing this issue in its discussion on the Appellant’s cooperation as a mitigating circumstance.”

“The Appeals Chamber finds that it was within the Trial Chamber’s discretion to assess the testimony of [a certain witness] as evidence of the Appellant’s remorse; the Trial Chamber was not bound to consider this factor when assessing the Appellant’s good character as well.”

“The Appeals Chamber observes that all the evidence in question [that Jokic argued was not considered by the Trial Chamber regarding his good character] was duly considered by the Trial Chamber when discussing the issue of mitigating circumstances. The Trial Chamber was fully cognisant of this evidence; this is apparent from the Sentencing Judgement which specifically refers to the Appellant’s voluntary surrender, his conduct while on provisional release, his admission of guilt, as well as the facts that he apologized to the Croatian Minister for Maritime Affairs and Foreign Affairs on the day of the shelling on 6 December 1991 and that these two men concluded a ceasefire the day after. The Appeals Chamber finds that it was within the Trial Chamber’s discretion to consider these factors as indications of the Appellant’s remorse and his substantial cooperation with the International Tribunal; the Trial Chamber was not bound to consider these factors when assessing the Appellant’s good character as well.”

f) Accepting guilty pleas

i) generally

Deronjic, (Trial Chamber), March 30, 2004, para. 40: “Rules 62 (VI) and 62 bis of the Rules, which govern the taking of a guilty plea, set out the criteria to be applied in such a case. The Rules provide as follows:

Rule 62 bis
Guilty Pleas

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;

- (ii) the guilty plea is informed;
 - (iii) the guilty plea is not equivocal; and
 - (iv) there is sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,
- the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.”

Deronjić, (Trial Chamber), March 30, 2004, para. 42: “The Rule providing for the procedure for plea agreements between the Prosecution and the Defence states as follows:

Rule 62 *ter*
Plea Agreement Procedure

(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.”

See also Nikolić – Momir, (Trial Chamber), December 2, 2003, paras. 43, 44: “The Statute does not directly address the issue of a guilty plea. Article 20, paragraph 3, of the Statute provides:

The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.”

“Rule 62 *bis* of the Rules . . . provides the elements which must be established to enter a conviction upon a guilty plea. Rule 62 *ter* of the Rules provides the procedure for plea agreements between the Prosecution and the Defence.”

**ii) guilty pleas are provided for at other international criminal courts/
requirements of Rule 62 *bis* reflect national and international law**

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 45: “The Trial Chamber finds that guilty pleas are provided for in the instruments of other international criminal courts, and that the elements which must be established under Rule 62 *bis* are reflective of the requirements for the acceptance of guilty pleas in national systems as well as on the international level.”

**iii) plea must be voluntary, informed, unequivocal, and supported by a
sufficient factual basis**

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 8: “[C]ertain pre-conditions must be satisfied before a plea of guilty can be entered. [T]he minimum pre-conditions are as follows:

- (a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises.
- (b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty;
- (c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 54: “The Trial Chamber recalls the language of Rule 62 *bis*: [The Trial Chamber must satisfy] itself that the four pre-requisites for accepting a guilty plea have been met [those set forth in Rule 62 *bis*—the plea must be voluntary, informed, unequivocal and supported by a sufficient factual basis].”

(1) voluntary

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 10: “[A] guilty plea [must] be made voluntarily. Voluntariness involves two elements. Firstly, an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty. Secondly, the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 52: “In determining if the guilty plea was made voluntarily, a trial chamber may inquire into the reasons for the change of plea and, if the guilty plea is a result of a plea agreement, the conditions under which the agreement was reached.”

(a) application—voluntary

Babic, (Appeals Chamber), July 18, 2005, para. 11: “With regard to the Appellant’s allegation that he was essentially ‘coerced’ by the Trial Chamber to enter a plea of guilty as co-perpetrator to Count 1 of the Indictment, the Appeals Chamber notes that: (1) the Plea Agreement itself states that ‘Milan Babic acknowledges that he has entered this Plea Agreement freely and voluntarily, [and] that no threats were made to induce him to enter this guilty plea;’ and (2) the Appellant himself confirmed this during the Further Initial Appearance. The Appeals Chamber finds that the Trial Chamber correctly fulfilled its obligations pursuant to Rule 62bis of the Rules and that therefore the plea entered by the Appellant on 28 January 2004 is valid.”

(2) informed

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 14: “[A]ll common law jurisdictions insist that an accused who pleads guilty must understand the nature and consequences of his plea and to what precisely he is pleading guilty.” In the case at hand, “an informed plea would require that the Appellant understand (a) the nature of the charges against him and the consequences of pleading guilty generally; and (b) the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 52: “In deciding if the guilty plea is informed, a trial chamber may inquire into the accused’s understanding of the elements of the crime or crimes to which he has pled guilty to ensure that his understanding of the requirements of the crime reflects his actual conduct and participation as well as his state of mind or intent when he committed the crime.”

(a) rights waived by pleading guilty

Mrdja, (Trial Chamber), March 31, 2004, para. 4: Darko Mrdja “understood that, by entering into the Plea Agreement, he gave up the rights listed therein, including: the right to plead not guilty and require the Prosecution to prove charges in the Indictment beyond a reasonable doubt at a fair and impartial public trial; the right to prepare and put forward a defence to the charges at a public trial; the right to be tried without undue delay; the right to be tried in his presence and to defend himself in person at trial or through legal assistance of his own choosing; the right to examine at trial, or have

examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf at trial under the same conditions as witnesses against him; the right not to be compelled to testify against himself or to confess guilt; the right to testify or to remain silent at trial; and the right to appeal a finding of guilty or to appeal any pre-trial rulings.” See also *Obradovic*, (Trial Chamber), December 10, 2003, para. 15 (similar list of rights articulated); *Nikolic – Momir*, (Trial Chamber), December 2, 2003, para. 18 (similar list of rights articulated).

Nikolic – Momir, (Trial Chamber), December 2, 2003, para. 48: “As part of the agreement, the accused agrees to waive many of the rights guaranteed to him or her under the Statute and recognised as fundamental rights in human rights law. Most critically, the accused waives his or her right to be presumed innocent and have the Prosecution bear the burden of establishing his or her guilt beyond a reasonable doubt at a public trial.”

(3) unequivocal

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 31: “Whether a plea of guilty is equivocal must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law.”

Nikolic – Momir, (Trial Chamber), December 2, 2003, para. 52: “In determining if a plea is equivocal, a trial chamber may question the defence as to its intention to raise any defences.”

(4) determining whether there is a sufficient factual basis for the crime and the accused’s participation in it

Babic, (Appeals Chamber), July 18, 2005, para. 18: “In the specific case of a sentencing judgement following a guilty plea, the Trial Chamber, pursuant to Rule 62bis (iv) of the Rules, must be satisfied that ‘there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case.’ A common procedure is that the parties enter negotiations and agree on the facts underlying the charges to which the accused will plead. The parties may also submit, pursuant to Rule 100(A) of the Rules, ‘any relevant information that may assist the Trial Chamber in determining an appropriate sentence.’ On the basis of the facts agreed upon by the parties as well as the additional information provided by the parties pursuant to Rule 100(A) (including those facts presented during the sentencing hearing), the Trial Chamber exercises its discretion in determining the sentence.”

Babic, (Appeals Chamber), July 18, 2005, para. 86: “In cases of guilty pleas, Trial

Chambers must, pursuant to Rule 62bis (iv), determine whether ‘there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case.’ In the case of a plea agreement, a Trial Chamber enters its finding of guilt on the basis of the facts agreed upon by the parties, as set out in the indictment and in the statement of facts. It cannot therefore be said that a Trial Chamber can at the sentencing stage simply disregard those facts, which are the basis of the finding of guilt they enter.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 52: “In determining whether a sufficient factual basis for the crime exists, a trial chamber may find it necessary to ask the Prosecution to adduce additional or supporting evidence, or may ask the accused specific questions to clarify his particular conduct or involvement in the commission of the crime to which he has pled guilty. In questioning about the factual basis, a trial chamber may seek to ensure that the totality of the accused’s criminal conduct is reflected and that an accurate historical record exists, as well as ensure that the accused is pleading guilty to no more than that for which he is, in fact, guilty.”

Todorovic, (Trial Chamber), July 31, 2001, para. 25: “[U]nder [Rule 62 bis], a guilty plea cannot form the sole basis for the conviction of an accused; the Trial Chamber must also be satisfied that ‘there is a sufficient factual basis for the crime and the accused’s participation in it.’ [T]he Trial Chamber may rely on either independent indicia or on the lack of ‘any material disagreement between the parties about the facts of the case.’”

Jelavic, (Trial Chamber), December 14, 1999, paras. 25, 26, 28: “A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime.” The judges must verify that “there is sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.” The Trial Chamber also held that it “must also verify whether the elements presented in the guilty plea are sufficient to establish the crimes acknowledged.”

(5) application—voluntary, informed, unequivocal and supported by a sufficient factual basis

Babic, (Appeals Chamber), July 18, 2005, para. 9: “At [Babic’s] Further Initial Appearance, the Presiding Judge made clear to the Appellant that his plea had to be ‘voluntary’ – such that ‘no threats were made to [him] to induce [him] to enter this guilty plea’ – and informed. In that respect, the Presiding Judge specifically asked the Appellant whether he ‘fully understood what [his] commitments [were],’ to which he replied that

he did. The Presiding Judge further asked the Appellant whether he was also aware of what led the parties to enter into the new plea agreement and of the differences between pleading guilty as an aider and abettor and as a co-perpetrator, to which he also replied that he did. On 28 January 2004, satisfied that the plea was, pursuant to Rule 62*bis* of the Rules, voluntary, informed, unequivocal, and supported by a sufficient factual basis, the Trial Chamber entered a finding of guilt on Count 1 of the Indictment.”

iv) Trial Chamber may inquire into the terms of the plea agreement

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 49, 53: “Once an agreement has been reached, it is subject to review by the trial chamber. A trial chamber may inquire into the terms of the agreement to ensure that neither party was unfairly treated and particularly that the rights of the accused are respected. As indicated above, once the plea agreement has been accepted, a trial chamber will continue in its role as guarantor of the fairness of the proceedings and protector of the rights of the accused by inquiring into the nature of the guilty plea, pursuant to Rule 62 *bis* of the Rules. Thus, while the parties have the autonomy to enter into plea agreements, the trial chambers retain the ultimate authority over both the process and the proceedings.”

“A Trial Chamber may . . . enquire into the terms of the plea agreement. Indeed, . . . in this case the Trial Chamber questioned the Parties about certain terms of the agreement, and specifically the Prosecution’s intention to withdraw the remaining counts against Momir Nikolic only at the time that he was sentenced, and not at the time that he entered a plea of guilty, as specified in Rule 62 *ter* (A)(i).”

v) Trial Chamber has discretion whether to accept guilty plea

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 54: “The Trial Chamber recalls the language of Rule 62 *bis*: After satisfying itself that the four pre-requisites for accepting a guilty plea have been met, a trial chamber ‘may’ enter a finding of guilt. Thus, a trial chamber has discretion whether to accept a guilty plea.”

vi) factors for Trial Chamber to consider in determining whether to accept guilty plea

Obrenovic, (Trial Chamber), December 10, 2003, para. 19: “As this Trial Chamber has previously held, the acceptance of a guilty plea pursuant to a plea agreement must follow careful consideration by a trial chamber of numerous factors including *inter alia* whether the remaining charges reflect the totality of an accused’s criminal conduct, whether an accurate historical record will be created, whether the terms of the agreement fully respect the rights of the accused, and whether due regard is accorded to the interests of victims.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 54: “While the reason for not accepting a guilty plea may be that a trial chamber is not satisfied with the terms of the plea agreement or has concerns that the rights of the accused have not been adequately protected, a trial chamber may also reject a particular guilty plea based on a plea agreement because it does not consider that the plea agreement is in the interests of justice.”

For discussion of the purposes served by accepting guilty pleas, see “guilty plea,” Section (IX)(c)(v)(3)(c), ICTY Digest.

For discussion of “concerns regarding plea agreements in cases involving serious violations of international humanitarian law,” see Section (X)(f)(xiv), ICTY Digest.

(1) application—factors for Trial Chamber to consider in determining whether to accept guilty plea

Obrenovic, (Trial Chamber), December 10, 2003, paras. 20, 75, 77, 76: “Upon being seized of the Joint Motion, the Trial Chamber carefully considered the various factors implicated in its acceptance or rejection of the plea agreement and guilty plea. The Trial Chamber determined that the guilty plea of Dragan Obrenovic pursuant to the Plea Agreement was in the interests of justice and therefore accepted his guilty plea on 21 May 2003. The Trial Chamber’s determination was based on the following factors, *inter alia*: (a) the acceptance of responsibility of Dragan Obrenovic for his criminal conduct; (b) the establishment of an undisputed record about the crimes committed following the fall of Srebrenica which may contribute to reconciliation; (c) Dragan Obrenovic’s agreement to co-operate with the Prosecution and provide testimony in the cases against other accused indicted for crimes related to Srebrenica, particularly in light of his position as an officer in the VRS [Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska]; (d) the fact that certain witnesses would not need to come to testify at the Tribunal; and (e) the fact that the Prosecution did not withdraw any factual allegations related to the criminal conduct for which Dragan Obrenovic accepted individual criminal responsibility. The Trial Chamber further considered that an accused has the right to decide what plea to enter to the charges against him.”

“The fact that ‘an insider,’ and particularly a person who had worked in security and intelligence, would be willing to testify in all cases related to the crimes committed around Srebrenica was a factor that the Trial Chamber took into consideration in deciding on whether to accept Momir Nikolic’s guilty plea.”

“Following the guilty plea of Momir Nikolic, the Prosecution was able to withdraw numerous witnesses from its witness list. The Trial Chamber considered this factor to weigh in favour of accepting a guilty plea in this case.”

“The Trial Chamber considered Momir Nikolic’s acknowledgment of the crimes committed following the fall of Srebrenica and his role therein, as well as the role of other Bosnian Serbs members of the joint criminal enterprise, to be significant in

verifying that these crimes were in fact committed and who was responsible for their commission. Such an acknowledgement may contribute to the establishment of the truth in all areas and communities in the former Yugoslavia. Until such crimes have been recognised, no steps can be taken to apologise for those crimes or seek forgiveness for ones role, however large or small, in their commission. Therefore, the Trial Chamber considered this to be an important factor weighing in favour of accepting the guilty plea.”

For discussion of guilty pleas as a mitigating factor, see “application—guilty pleas, Section (IX)(c)(iv)(3)(c)(xiv), ICTY Digest.

vii) parties may recommend sentence, but Trial Chamber not bound

Babic, (Appeals Chamber), July 18, 2005, para. 30: “The Appeals Chamber notes that Rule 62ter (B) of the Rules unambiguously states that Trial Chambers shall not be bound by any agreement between the parties.” *See also Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 89 (same).

Deronjic, (Trial Chamber), March 30, 2004, para. 41: “[T]he Trial Chamber is not bound by a sentence recommendation contained in a plea agreement.”

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 11: “In exchange for Miodrag Jokic’s guilty plea, his complete cooperation with the Prosecution, and the fulfilment of all his obligations under the Plea Agreement, the Prosecution agreed to recommend to the Trial Chamber the imposition of a single sentence of 10 years’ imprisonment. Miodrag Jokic is however entitled, according to the Plea Agreement, to argue for a lesser sentence based on any mitigating circumstances raised by him. The Trial Chamber is not bound by any agreement reached between the parties on the preferred sentence.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, para. 279: “The Trial Chamber is not bound by a recommended sentence specified in a plea agreement. The Accused was defended by a highly professional Defence Counsel and was explicitly cautioned by the Trial Chamber in open court that the Trial Chamber is not bound by the recommendation. The Accused understood the terms of the plea agreement and fully recognised his understanding and acceptance of the rule that the Trial Chamber is not bound by this recommendation and that the sentence has to be determined on the basis of the gravity of the crime and all relevant aggravating and mitigating factors.”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 55: “An additional point of ‘negotiation’ in reaching a plea agreement might include Prosecution’s agreement to recommend a particular sentence or sentencing range.” “As stated in Rule 62ter (B), a Trial Chamber is not bound by the recommendations of the parties.” *See also Nikolic - Momir*, (Trial Chamber), December 2, 2003, para. 172 (similar).

Banovic, (Trial Chamber), October 28, 2003, para. 94: “Under the Plea Agreement and pursuant to Rule 62 *ter* (A)(ii) of the Rules, the parties have jointly recommended that a sentence of eight years be imposed. Although, as already noted, the Trial Chamber is not bound by this agreement”

(1) Trial Chamber shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially, give reasons for the departure

Babic, (Appeals Chamber), July 18, 2005, para. 30: “In exercising their discretion to impose a sentence, Trial Chambers must take into account the special context of a plea agreement as an additional factor. A plea agreement is a matter of considerable importance as it involves an admission of guilt by the accused. Furthermore, recommendation of a range of sentences or, as in the present case, a specific maximum sentence, reflects an agreement between the parties as to what in their view would constitute a fair sentence. . . . [I]n the specific context of a sentencing judgement following a plea agreement, the Appeals Chamber emphasises that Trial Chambers shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure. Those reasons, combined with the Trial Chambers’ obligation pursuant to Article 23(2) of the Statute to render a Judgement ‘accompanied by a reasoned opinion in writing,’ will facilitate a meaningful exercise of the convicted person’s right to appeal and allow the Appeals Chamber ‘to understand and review the findings of the Trial Chamber.’” See also *Babic*, (Appeals Chamber), July 18, 2005, para. 86 (similar); *Nikolic - Dragan*, (Appeals Chamber), February 4, 2005, para. 89 (similar).

For discussion of the requirement that the Trial Chamber issue a reasoned opinion in writing, see “reasoned opinion in writing required,” Section (X)(d)(ii)(6), ICTY Digest.

(2) application—giving due consideration to the recommendation of the parties

Babic, (Appeals Chamber), July 18, 2005, para. 31: “In the present case, the Trial Chamber found that ‘the recommendation made by the Prosecution of a sentence of imprisonment of no more than 11 years would not do justice in view of the applicable sentencing principles and the gravity of *Babic*’s crime taking account of the aggravating and mitigating circumstances.’ This shows that the Trial Chamber gave due consideration to the recommendation made by the Prosecution and did explain why it could not follow it. Reference to the Trial Chamber’s assessment of the gravity of the crimes and the aggravating and mitigating circumstances is, in the present case, sufficient to allow the Appellant – as he in fact did in his other grounds of appeal – to meaningfully exercise his right to appeal pursuant to Article 23(2).” See also *Babic*, (Trial Chamber), June 29, 2004, para. 101 (Trial Chamber ruling).

Nikolic - Dragan, (Appeals Chamber), February 4, 2005, para. 90: “In the present case, the Trial Chamber made clear to the parties, in open court, that it was not bound by the recommendation of the parties. It asked Dragan Nikolic whether he understood that the final arbiter for the sentence is without any doubt the Trial Chamber, to which he replied that he fully did. Further, contrary to the parties’ submissions, the Trial Chamber clearly stated why it could not follow such a recommendation:

Balancing the gravity of the crimes and aggravating factors against mitigating factors and taking into account the aforementioned goals of sentencing, the Trial Chamber is not able to follow the recommendation given by the Prosecution. The brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as that recommended unjust. The Trial Chamber believes that it is not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence than the one recommended by the Parties.

The Appeals Chamber finds that the above reasons are sufficient to reject the proposition that the Trial Chamber abused its discretion in departing from the parties’ recommendation.” See also *Nikolic - Dragan*, (Trial Chamber), December 18, 2003, para. 281 (Trial Chamber ruling appealed from and source of quoted language).

viii) plea agreement may include agreement to testify in other cases

Obrenovic, (Trial Chamber), December 10, 2003, para. 14: As part of his plea agreement “Dragan Obrenovic agrees to ‘co-operate with and provide truthful and complete information to the Office of the Prosecutor whenever requested,’ including meeting whenever necessary with the Prosecutor, testifying truthfully in the trial of his former co-accused, and ‘in any other trials, hearings or other proceedings before this Tribunal for accused charged with offences relating to the fall of Srebrenica in July 1995 and its aftermath, as requested by the [Office of the Prosecutor].”

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 55: “Additional consideration for this recommendation [by the Prosecutor as to the sentence] may include agreement to testify for the Prosecution in other cases before the Tribunal.”

ix) plea agreement may include agreement not to appeal unless the Trial Chamber’s sentence is above the range recommended by the Prosecutor

Obrenovic, (Trial Chamber), December 10, 2003, para. 14: “Dragan Obrenovic . . . agrees that he will not appeal the sentence imposed by the Trial Chamber unless the sentence is above the range recommended by the Prosecutor.”

- x) plea agreement may include agreement to amend the indictment to withdraw charges or drop factual allegations**

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 48: “In conferring on these agreements, the parties meet without the presence of any member of the trial chamber and effectively ‘negotiate’ the terms of an agreement, the result of which is an accused pleading guilty to one or more of the counts of the indictment. The ‘negotiations’ can result in the Prosecution agreeing to amend the indictment to withdraw certain charges or drop certain factual allegations.”

- xi) Trial Chambers generally grant leave to withdraw charges where part of plea agreement, but remaining charges should reflect the totality of the accused’s criminal conduct**

Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 50: “In cases of plea agreements where the Prosecution has expressed its intention not to proceed to trial on certain charges, such motions are generally granted; a trial chamber *may* seek to satisfy itself that the remaining charges reflect the totality of the criminal conduct of the accused.” (emphasis added)

See also Nikolic - Momir, (Trial Chamber), December 2, 2003, para. 65: “If the Prosecutor make a plea agreement such that the totality of an individuals criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record. Convictions entered by a trial chamber must accurately reflect the actual conduct and crime committed and must not simply reflect the agreement of the parties as to what would be a suitable settlement of the matter.”

Compare “discretion to impose concurrent, consecutive, a mixture of concurrent and consecutive, or single sentence, but *must* reflect ‘totality’ of the criminal conduct,” (emphasis added), Section (IX)(c)(vii)(4), ICTY Digest.

- (a) the role of the Prosecutor—whether there is a duty to present all evidence available**

Deronjic, (Trial Chamber), Dissenting Opinion of Judge Schomburg, March 30, 2004, paras. 6-10, 4: “*Da mihi factum, dabo tibi jus*’ – give me (all) the facts and I will present you the applicable law (and a just decision). This wise Roman principle unfortunately is not part of our Rules. However, under the mandate of this *ad hoc* Tribunal the Prosecutor, being part of the Tribunal, is in principle duty bound to present all the

evidence available. The fundament of our Tribunal is the Statute based on Chapter VII of the Charter of the United Nations established as a measure to maintain or restore international peace and security. However, there is no peace without justice; there is no justice without truth, meaning the entire truth and nothing but the truth.”

“The International Prosecutor is not controlled *de jure* or *de facto* by independent judges or a government in the selection of suspects to be indicted and in determining the scope of an indictment, as it would be on a domestic level. The state’s and the international community’s monopoly over the right to exercise force, however, urges the Prosecutor to act in a way that makes victims of crimes and their relatives understand that the Prosecutor is acting on their behalf. When it comes to prosecuting crimes against individuals, a Prosecutor acts with the goal to stop a never-ending circle of ‘private justice,’ meaning mutual violence and vengeance. This goal can only be achieved if the entire picture of a crime is presented to the judges.”

“I accept and appreciate that judicial economy and, *in concreto*, the limited resources of this Tribunal call for a limitation of charges, if only a just judgement remains possible. The test should be, whether individual separable parts of an offense or several violations of law committed as a result of the same offence are not particularly significant for the penalty to be imposed. In those cases the prosecution may be limited to the other parts of the offense or violations of law.” “However this test has not been met when conducting investigations, prosecution and indicting Miroslav Deronjic.”

“One might say, under the Rules of this Tribunal, that it is for the Prosecutor alone to decide whom, and under which charges, to indict. In principle, this is correct. However, it is also for the Prosecutor to safeguard that justice is seen to be done and to convince, in particular, those people on whose behalf this Tribunal is working that there is no arbitrary selection of persons to be indicted and no arbitrary selection of charges or facts in case of an indictment. I am afraid that such an unjustified premature procedure has been applied in the proceedings against Miroslav Deronjic.” “[T]he series of indictments, including the Second Amended Indictment, arbitrarily present facts, selected from the context of a larger criminal plan and, for unknown reasons, limited to one day and to the village of Glogova only.”

xii) Trial Chamber generally limited to facts stipulated in indictment and pursuant to plea agreement

Bralo, (Trial Chamber), December 7, 2005, para. 25: “[In evaluating the gravity of the crimes and reaching the necessary conclusions with regard to the appropriate sentence for those crimes where there has been a guilty plea] the Trial Chamber relies only upon facts contained in the Factual Basis agreed between the parties, in addition to the statements concerning the impact of the crimes on the various victims appended to the Prosecution Brief.”

Deronjic, (Trial Chamber), March 30, 2004, para. 41: “After having accepted a guilty plea on the basis of a plea agreement, a tribunal in party-driven systems, such as the ICTY

and the ICTR, is limited to any legal and/or factual assessment contained in, or annexed to the plea agreement.”

Jokic - Miodrag, (Trial Chamber), March 18, 2004, para. 20: “Having accepted Miodrag Jokic’s guilty plea on the basis of the Plea Agreement, the Trial Chamber limits itself to the submissions on the facts made by the parties.”

Nikolic - Dragan, (Trial Chamber), December 18, 2003, paras. 48, 106: “Having accepted a guilty plea on the basis of a plea agreement, a Trial Chamber operating in a party-driven system such as the ICTY is thereafter limited to what is specifically contained in, or annexed to, the plea agreement. Simply put, the Trial Chamber cannot go beyond what is contained in a plea agreement with regard to the facts of the case and the legal assessment of these facts.” “The Trial Chamber feels it is necessary at this point to reiterate that it is bound by the assessment provided by the Prosecution in the Plea Agreement and will therefore refrain from other possible assessments.”

Compare Jokic - Miodrag, (Appeals Chamber), August 30, 2005, paras. 9, 15, 19, 20: “The Appellant submits that the Trial Chamber erred in ruling that he is liable under Article 7(1) of the Statute for aiding and abetting for events prior to 6 December 1991. In doing so, according to the Appellant, the Trial Chamber went beyond what was pleaded in the Second Amended Indictment and agreed upon in the Plea Agreement, which expressly limited his responsibility as an aider and abettor to his conduct on and the events of 6 December 1991 only.” “[I]t is evident to the Appeals Chamber that the Trial Chamber cited the Appellant’s earlier conduct to provide context for the 6 December crimes. That context was relevant to the question whether the Appellant’s awareness from the early hours of the morning of 6 December 1991 of the unlawful shelling of the Old Town of Dubrovnik was sufficient to establish the *mens rea* requirement to support a conviction for aiding and abetting.” “The Appeals Chamber is satisfied that the Trial Chamber did not err in making a mere reference — *and not a finding on the crimes charged* — to the events prior to 6 December 1991 in its Sentencing Judgement.” “Moreover, even if the Trial Chamber had erred in referring to the earlier events, the Appellant has not illustrated how this error invalidated the Sentencing Judgement.” (emphasis in original)

**(1) where Trial Chamber may consider evidence beyond the
“plea agreement package”**

Deronjic, (Appeals Chamber), July 20, 2005, para. 15-19: “[T]he Appeals Chamber finds that the Trial Chamber did not err in going beyond the Plea Agreement Package [the Second Amended Indictment, Plea Agreement and Factual Basis] in order to establish a sufficient factual basis for the guilty plea” Having found discrepancies between the Second Amended Indictment and Factual Basis, the Trial Chamber invited the parties to provide clarification. “[T]he Trial Chamber did not err in determining the Appellant’s

sentence by considering all relevant information it had before it, including the evidence submitted by the Appellant himself.”

(2) where issue of Trial Chamber considering evidence beyond plea agreement not raised, it was waived

Deronjic, (Appeals Chamber), July 20, 2005, para. 19: Where the Trial Chamber had made it clear that, in addition to the Plea Agreement Package [the Second Amended Indictment, Plea Agreement and Factual Basis], the Chamber would be using evidence submitted by the parties in determining the sentence, the Appeals Chamber held that: “the Appellant was aware at the Sentencing Hearing and at the Continued Sentencing Hearing that he could object to the Trial Chamber’s considering evidence that in his view went beyond the Plea Agreement Package, but failed to do so and, as a result, waived his right to do so on appeal.”

xiii) where discrepancies between indictment and factual basis, indictment controls

Deronjic, (Appeals Chamber), July 20, 2005, para. 17: “The Trial Chamber made it clear that the agreed Factual Basis is to be treated as mere support for the guilty plea *specifically in the case where it is discrepant with the Indictment*, such that the Indictment shall be regarded as controlling. The Appeals Chamber considers that this approach was correct.” (emphasis in original) *See also Deronjic*, (Trial Chamber), March 30, 2004, para. 47 (similar).

xiv) concerns regarding plea agreements in cases involving serious violations of international humanitarian law

Nikolic - Momir, (Trial Chamber), December 2, 2003, paras. 57, 65, 66, 69-73: “The Trial Chamber has no doubt that plea agreements are *permissible* under the Statute and the Rules of the Tribunal. As plea agreements follow discussions or ‘negotiations’ between the Prosecutor and the defence such that the parties agree to which counts or factual allegations an accused will plead guilty, the Trial Chamber does, however, have some concerns about the use of such agreements in cases which come before the Tribunal. These concerns arise from both the nature of the offences over which this Tribunal has jurisdiction and the basis for the establishment of the Tribunal, namely Chapter VII of the United Nations Charter. . . .” (emphasis in original)

“In cases where charges are withdrawn, extreme caution must be urged. The Prosecutor has a duty to prosecute serious violations of international humanitarian law. The crimes falling within the jurisdiction of this Tribunal are fundamentally different from crimes prosecuted nationally. Although it may seem appropriate to ‘negotiate’ a charge of attempted murder to a charge of aggravated assault, any ‘negotiations’ on a charge of genocide or crimes against humanity must be carefully considered and be

entered into for good cause. While the principle of mandatory prosecutions is not part of the Tribunal's Statute, the Prosecutor does have a duty to prepare an indictment upon a determination that a *prima facie* case exists. The Prosecutor must carefully consider the factual basis and existing evidence when deciding what charge most adequately reflects the underlying criminal conduct of an accused. Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor make a plea agreement such that the totality of an individuals criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record. Convictions entered by a trial chamber must accurately reflect the actual conduct and crime committed and must not simply reflect the agreement of the parties as to what would be a suitable settlement of the matter."

"[T]he Trial Chamber has a responsibility to ensure that all accused are treated equally before the law. The Prosecutor may seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in prosecutions of other, more high ranking accused. The Prosecutor may make the terms of such a plea agreement quite generous in order to secure the co-operation of that accused. Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement."

The Trial Chamber then discussed various benefits of guilty pleas: (a) "a guilty plea leads directly to the fulfilment of a fundamental purpose of this Tribunal [to punish persons responsible for serious violations of international humanitarian law];" (b) "denial of the commission of the crime may no longer be an option;" (c) "guilty pleas can substantially assist in . . . investigations and presentation of evidence at trials of other accused, including high ranking accused;" (d) "a guilty plea may be more meaningful and significant than a finding of guilt by a trial chamber to the victims and survivors;" (e) "an admission of guilt from a person perceived as 'the enemy' may serve as an opening for dialogue and reconciliation between different groups;" (f) "[w]hen an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created."

"The Trial Chamber finds that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal. The Trial Chamber further finds, however, that based on the duties incumbent on the Prosecutor and the Trial Chambers pursuant to the Statute of the Tribunal, the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice."

For discussion of the purposes served by accepting guilty pleas, see “guilty plea,” Section (IX)(c)(iv)(3)(c), ICTY Digest.

xv) no precedent for an “open plea”

Babic, (Appeals Chamber), July 18, 2005, para. 12: “The Appellant . . . argues that the Trial Chamber should have allowed him to enter an ‘open plea’ to the crime of persecution (Count 1), which would have permitted the Trial Chamber to reserve its decision as to his degree of culpability until after hearing the parties’ submissions and conducting the Sentencing Hearing. The Appeals Chamber does not agree with that contention. As the Prosecution observes, ‘there is no precedent for such an “open plea” at this Tribunal.’ Moreover, it is hard to see how the Trial Chamber could have accepted such a plea consistently with Rule 62*bis* of the Rules, which requires as the Prosecution observes, that a plea be unequivocal and made with full knowledge of its ‘nature and consequences.’ Finally, the Appellant has not shown that, because his request to file an ‘open plea’ was denied, the plea that he did enter was not voluntary or was otherwise invalid. The Appellant specifically agreed in the Plea Agreement to plead guilty to Count 1 ‘because he is in fact guilty as a co-perpetrator’ and, as noted above, the Trial Chamber satisfied its responsibility to ensure that the Plea Agreement was entered freely and voluntarily.”



A young Bosnian rushes across a dangerous intersection in Mostar where many civilians were killed by sniper fire.

© 1993 Corinne Dufko

HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299

www.hrw.org

GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

A Topical Digest of the Case Law of the International Criminal Tribunal
for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) has played a critical role in determining responsibility for the horrific crimes that occurred in the Balkan conflicts during the 1990s. These conflicts claimed the lives of more than 200,000 individuals. The ICTY and International Criminal Tribunal for Rwanda have also delivered the crucial message that the most serious crimes will not go unpunished.

The ICTY has tried those involved in atrocities such as: the Srebrenica massacre—where approximately 7,000 unarmed men and boys were executed by Bosnian-Serb forces; the siege of Sarajevo; and brutalities perpetrated in camps such as the infamous “Omarska camp” in Bosnia-Herzegovina.

This digest of the ICTY law, which updates Human Rights Watch’s February 2004 edition of ICTR and ICTY case law, organizes the ICTY’s judgments topically, covering:

- war crimes
- genocide
- crimes against humanity
- individual criminal responsibility
- command responsibility
- affirmative defenses
- jurisdiction
- sentencing
- fair trial rights
- guilty pleas, and
- appellate review.

This digest, updated through December 31, 2005, also applies the law to the facts of selected cases.

The United Nations Development Programme translated Human Rights Watch’s original digest into Bosnian-Croatian-Serbian. The original digest was used in training sessions with prosecutors and judges in Croatia and judges elsewhere.

The original digest was well-received by officials of international and “hybrid” criminal tribunals:

“The book is ... a very important contribution to the understanding of the Tribunal’s case law.”

PHILIPPE KIRSCH,
PRESIDENT, INTERNATIONAL CRIMINAL COURT

“I believe that the digest will be useful not only to practitioners and academics, but also to organizations, both governmental and non-governmental, and contribute to their increased knowledge and understanding of international criminal law.”

CARLA DEL PONTE, PROSECUTOR, ICTY

“I have no doubt that the digest will be useful to us in our work and to all those interested in the process of international criminal justice.”

HASSAN B. JALLOW, PROSECUTOR, ICTR

“Our prosecutors are sure to make good use of this impressive book.”

DAVID M. CRANE,
PROSECUTOR, SPECIAL COURT FOR SIERRA LEONE

This digest is an indispensable guide for practitioners, judges and academics examining the crimes of genocide, war crimes and crimes against humanity.

ISBN 1-56432-339-0



9 781564 323392